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THE SUPREME COURT GOES DORMANT WHEN DESPERATE TIMES CALL FOR DESPERATE MEASURES: LOOKING TO THE EUROPEAN UNION FOR A LESSON IN ENVIRONMENTAL PROTECTION

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INTRODUCTION

The United States leads the world in protecting democracy, protecting human rights, and protecting industry and free trade, but it has fallen behind in the race to protect the environment.[1] At the same time, it has not fallen behind in waste production. The United States continues to lead the world in waste, generating 275 million tons of "hazardous waste"[2] and 200 million tons of household waste per year.[3] And waste generation is only expected to increase. The Environmental Protection Agency (the "EPA") estimates that Americans will be generating 216 million tons of garbage by the year 2000.[4] As landfill

1. *See United States Ambassador Defends U.S. Position as Global Leader on Environment Issues*, 12/20/95 Int'l Env't Daily (BNA) doc. 3 (Dec. 20, 1995), *available in* Westlaw, BNA-IED database (noting suggestions that "while the United States has shown exemplary leadership on issues such as the strife in Bosnia, the Middle East, and Northern Ireland, it has fallen behind on environment issues"). According to Stuart Eizenstadt, U.S. Ambassador to the European Union, however, the United States "feel[s] that environment is one of the most important issues in the U.S., and [it does] not feel [it has] relinquished a leadership role." *Id.*

2. *Waste Export Control Act: Hearings on H.R. 2525 Before Subcom. on Human Rights and International Organizations and the Subcom. on International Economic Policy and Trade of the Comm. on Foreign Relations*, 101st Cong., 1st Sess. 42 (1989) (statement of Scott A. Hojost, Acting Associate Administrator for International Affairs); *Multimedia Regulation: Impact of EPA's Regulatory Shift on Research Underscored at HERL CONFAB*, 1994 Daily Envtl. Rep. (BNA) No. 216, doc. 10 (Nov. 10, 1994), *available in* Westlaw, BNA-DEN database (statement by Barry Johnson, Assistant Administrator of the Agency for Toxic Substances and Disease Registry). The term hazardous waste as defined by the EPA, 40 C.F.R. §§ 261.20-261.24 (1996), under the Resource Conservation and Recovery Act, Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified in scattered sections of 42 U.S.C. §§ 6901-6992k (1994)) [hereinafter RCRA], is a misnomer. Waste not covered by the definition, such as household waste, contains toxic substances that seriously threaten the environment and human beings.

3. Noel Grove, *Recycling*, Nat'l Geographic, July 1994, at 92, 98; *see also OECD Says U.S. Should Scrutinize Consumption, Cut Unsound Subsidies*, 12/5/95 Int'l Env't Daily (BNA) doc. 3 (Dec. 5, 1995), *available in* Westlaw, BNA-IED database [hereinafter *U.S. Should Scrutinize Consumption*] ("The United States still records the largest per capita generation of municipal waste in the OECD." (quoting the Organization for Economic Cooperation and Development's (OECD's) environmental assessment of the United States)).

4. Don Phillips, *Garbage on the Rails: Out of Sight, Out of Mind; Containers Mask Cargo as Trains Roll Past D.C.*, Wash. Post, Dec. 22, 1991, at A1; *see also U.S. Should Scrutinize Consumption*, *supra* note 3 (stating that the per-person garbage volume has been increasing in sync with growth in the gross domestic product since 1980).

space becomes scarce and other methods of disposal are found to be inadequate, the country faces a disposal crisis.[5]

In 1976, Congress enacted the Resource Conservation and Recovery Act ("RCRA")[6] because "the problems of waste disposal . . . [had] become a matter national in scope and in concern."[7] RCRA created a comprehensive, "cradle to grave," regulatory program for hazardous wastes but left the management of "solid waste" to the states.[8] Since then, the United States has built an industry out of the management and disposal of hazardous and non-hazardous waste, and has fostered a booming national and international market in a useless[9] product. The very thing that makes waste disposal so lucrative, however, also exacerbates the disposal crisis: "[W]hile many are willing to generate waste, . . . few are willing to help dispose of it."[10] Instead of reducing consumption or finding an effective waste-management plan to deal with mounting piles of trash and industrial waste, people have simply paid someone to take it away.

As a nation, we generate "enough [garbage in one year] to fill a convoy of garbage trucks stretching eight times around the globe,"[11] and those trucks are on the move. More than fifteen million tons of garbage cross state lines each year;[12] approximately 375,000 tons of hazardous waste move in interstate commerce each year;[13] an estimated 2.2 million tons of hazardous waste cross international borders every year,[14] and these numbers are conservative. As long as people

5. *See generally* Anne Ziebarth, *Environmental Law: Solid Waste Transport and Disposal Across State Lines - The Commerce Clause Versus the Garbage Crisis*, 1990 Ann. Surv. Am. L. 365 (1990) (discussing the waste disposal crisis created by vanishing landfill space and by Commerce Clause restrictions on state waste management efforts).

6. Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified in scattered sections of 42 U.S.C. §§ 6901-6992k (1994)).

7. 42 U.S.C. § 6901(a)(4) (1994).

8. *Id.* (stating that "the collection and disposal of solid wastes should continue to be primarily the function of the State, regional, and local agencies").

9. The term useless does not include waste destined for reuse through recycling or as a raw material.

10. Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 504 U.S. 353, 369 (1992) (Rehnquist, C.J., dissenting); *see also* C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677, 1682 (1994) ("[W]hat makes garbage a profitable business is not its own worth but the fact that its possessor must pay to get rid of it.").

11. Grove, *supra* note 3, at 98.

12. Ann R. Mesnikoff, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home*, 76 Minn. L. Rev. 1219, 1220 (1992) (citing *Shipping Out the Trash*, 18 Envtl. F. 28 (Sept./Oct. 1991)).

13. *More States Are Exporters of Wastes Than Importers, Study of 1987 Data Finds*, 18 Int'l Env't Rep. (BNA) 753 (Oct. 4, 1995). This data is based on the last comprehensive study on the movement of hazardous waste made in 1987. Thus, the amount may not reflect today's increased movement of wastes.

14. *See* Mary Critharis, *Third World Nations Are Down in the Dumps: The Exportation of Hazardous Waste*, 16 Brook. J. Int'l L. 311, 311 (1990).

can easily send their waste elsewhere, there is little incentive to reduce consumption or to find efficient and safe means of disposal.

In the absence of federal regulation, states have made an effort to protect the environment and its citizens from the serious threats posed by the accumulation of waste. Maine and New Jersey responded to the health and safety threats of overburdened landfills by prohibiting out-of-state waste from being disposed of in their landfills.[15] The Supreme Court in *City of Philadelphia v. New Jersey*[16] struck down the New Jersey statute as an unconstitutional violation of the Commerce Clause, reasoning that it was facially discriminatory and therefore per se invalid.[17] By closing off a range of state waste management options, the *Philadelphia* decision created the need for Congressional action; Congress did not act.

In 1989, the EPA noted the growing problem of managing the enormous amount of waste not covered by RCRA and created an "Agenda for Action" that encouraged states to implement waste management schemes including, in order of desirability, source reduction, recycling, combustion, and landfilling.[18] The EPA also declared that state and local governments should "assume responsibility for the wastes generated within their jurisdictions."[19] States responded by enacting comprehensive waste management schemes for waste generated within their jurisdictions and attempting to reduce waste production overall by halting or at least slowing the march of waste across the nation. Again the Supreme Court thwarted these new attempts at environmental protection in the name of free trade and market unity.[20]

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15. *See* Me. Rev. Stat. Ann. tit. 17, § 2253 (West 1983); N.J. Stat. Ann. §§ 13:1 I-9 to I-10 (West 1979). The New Jersey Supreme Court upheld the statute against a Commerce Clause challenge. *See* Hackensack Meadowlands Dev. Comm. v. Municipal Sanitary Landfill Auth., 348 A.2d 505, 519 (N.J. 1975). The court reasoned that (1) useless material dangerous to public health was not an article of commerce protected by the Commerce Clause, *id.* at 513; and (2) although useful waste was an article of commerce, the statute advanced legitimate health and environmental interests through a necessary means and had an insignificant impact on interstate trade. *Id.* at 516-18.

16. 437 U.S. 617 (1978).

17. *Id.* at 626. The Court did not even discuss the possibility that the means chosen were necessary to effectively advance the legitimate state interests in protecting the environment and the health and safety of New Jersey's citizens.

18. Office of Solid Waste, United States Environmental Protection Agency, The Solid Waste Dilemma: An Agenda for Action 16-17 (1989) [hereinafter Agenda for Action].

19. 53 Fed. Reg. 36,885 (1988).

20. *See, e.g.*, C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677 (1994); Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 114 S. Ct. 1345 (1994); Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 504 U.S. 353 (1992).

Since the Court's last decision on the free movement of waste, federal courts have continued to invalidate state waste management schemes based on the dormant Commerce Clause. *See, e.g.*, National Solid Wastes Management Assoc. v Meyer, 63 F.3d

The Constitution states that "[t]he Congress shall have Power . . . To regulate Commerce . . . among the several States."[21] The Supreme Court has interpreted the Commerce Clause to give Congress plenary power to restrict or advance free trade among the states while prohibiting the states from placing any undue burden on interstate trade without specific congressional authorization.[22] These constitutionally mandated principles of free trade and market unity[23] have been a silent but deadly foe for state environmental protection measures. Because Congress has not been able to mobilize its Commerce power to remedy the situation, the Supreme Court today remains the final arbiter in the debate over how to balance trade and the environment in the United States.

With the environmental crisis reaching global proportions, international trade groups[24] have also faced problems in resolving the tension between the equally important objectives of free trade and environmental protection.[25] These groups not only acknowledge the importance of environmental objectives but also, unlike the Supreme Court, acknowledge that measures clearly interfering with the free movement of goods are in certain circumstances appropriate and necessary

652 (7th Cir. 1995) (invalidating under the Commerce Clause a Wisconsin statute mandating that all generators wishing to dispose of waste in Wisconsin landfills have and enforce a recycling program in the community of generation), *cert. denied*, 116 S. Ct. 1351 (1996); SDDS, Inc. v. South Dakota, 47 F.3d 263 (8th Cir. 1995) (invalidating under the Commerce Clause a South Dakota referendum voiding state approval of a large solid waste disposal facility because it did not apply to landfills that dispose of South Dakota waste).

21. U.S. Const. art. I, § 8, cl. 3.

22. *See infra* notes 68-71 and accompanying text. The restrictive portion of the Commerce Clause has been dubbed the dormant, silent, or negative Commerce Clause. Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425, 425 n.1 (1982).

23. *But see* Eule, *supra* note 22, at 434 (arguing that the Commerce Clause cannot establish a constitutional principle of free trade or market unity because it grants Congress plenary power to restrict trade).

24. *See, e.g.*, General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 194 [hereinafter GATT], now the World Trade Organization (WTO); North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 107 Stat. 2057, 32 I.L.M. 289 [hereinafter NAFTA]; Basel Convention on the Control of the Transboundary Movement of Hazardous Waste, Mar. 22, 1989, 28 I.L.M. 649 [hereinafter Basel Convention]; European Free Trade Association, Jan. 4, 1960, 370 U.N.T.S. 3 [hereinafter EFTA].

25. *See* Douglas J. Caldwell & David A. Wirth, *Trade and the Environment: Equilibrium or Imbalance?*, 17 Mich. J. Int'l L. 563, 563-64, 566 (Spring 1996) (book review) (giving examples of GATT, WTO, and Basel Convention disputes over trade restrictions based on environmental protection). Specifically, the authors mention the tuna-dolphin dispute within the GATT where certain countries banned imports of tuna caught without provisions for protecting dolphins, the dispute settled by the WTO over the United States' treatment of foreign refiners in a regulation enacted to protect air quality, heated controversy over a recent amendment to the Basel Convention that would ban exports of hazardous waste to developing countries, and a United States challenge in the WTO of the European Union's (EU's) ban on meat produced from animals treated with growth hormones. *Id.*

to attaining those objectives. The Basel Convention, for example, severely restricts the international market in hazardous wastes and advocates the eventual elimination of all hazardous waste exports from industrial nations.[26] One could argue that the Supreme Court should follow the world's lead and acknowledge that drastic measures are necessary to protect the environment.

On the other hand, the states of the United States are not independent sovereigns in a trade group bound only by public international law. The United States is a federal system that must operate under principles of dual sovereignty and constitutional supremacy. The United States Constitution establishes the principles and rules by which the people and institutions of the United States are governed. The Supreme Court is therefore bound to uphold the Constitution and one could argue that the Commerce Clause mandates the Court's conclusions.

Operating under a federal system with a constitution that permits constituent states to restrict free trade only in narrow circumstances, however, is not enough to require or justify the Supreme Court's actions. First, the Commerce Clause at most requires that the state choose the means least restrictive of free trade, yet still adequate to protect the environment.[27] The desperate nature of the disposal crisis and the risks to health and resources inherent in the accumulation of waste require desperate measures to protect the Earth and its inhabitants. Instead of rigidly and improperly applying its dormant Commerce Clause analysis to strike down any state's attempt to restrict the flow of waste, the Court should recognize those measures as constitutionally valid.

Second, when faced with the same issue in its own federal system, the European Court of Justice reached a very different conclusion. The European Union, with its system of dual sovereignty and Treaty

26. The United Nations Environmental Programme ("UNEP") established the Basel Convention on the Control of the Transboundary Movement of Hazardous Waste with the goals of: (1) encouraging countries to introduce measures designed to significantly reduce the generation of wastes and ultimately, eliminate their movement; (2) reducing transboundary movement of waste by making approval of movement difficult; (3) confining movement of waste to situations where it is environmentally sound to dispose of it somewhere other than a place close its source; and (4) controlling international trade in wastes. *See* Valentina O. Okaru, *The Basel Convention: Controlling the Movement of Hazardous Wastes to Developing Countries*, 4 Fordham Envtl. L. Rep. 137, 142-43 (Spring 1993); *see also* Janey Cohen, *Conference Participants Debate Trade Aspects of Basel Convention*, 19 Int'l Env't Rep. (BNA) 50 (Jan. 24, 1996) (discussing the trade implications of restricting transfrontier movement of waste). A recent amendment that completely bans exports of hazardous wastes to developing countries, however, has incited much controversy. *Ban on Waste Exports Outside OECD Pushed Through Basel Treaty Meeting*, 18 Int'l Env't Rep. (BNA) 753 (Oct. 4, 1995). The United States has signed, but has yet to ratify the convention. *See* Cohen, *supra*, at 51.

27. *See infra* text accompanying note 315.

supremacy, is very similar in structure to the United States[28] and has often looked to the United States when formulating basic principles of government and when dealing with the conflicts that arise in a federal system. Narrowing the focus of comparison to the conflict between market unity or free trade and environmental protection, the similarity becomes striking. The European Union was founded to unify the European market and as such, its constitutional charter expressly protects the free movement of goods among the Member States from undue restriction.[29] In the face of the environmental crisis, the Member States of the European Union have enacted measures that threaten free trade and the unified market. Because the European Union's legislative bodies have not preempted the regulation of nonhazardous waste,[30] the EC Treaty is the only true limit on the Member States' power to restrict the movement of nonhazardous waste. Finally, the European Court of Justice is the final arbiter of constitutional questions and has developed a doctrine to deal with the validity of Member State measures that interfere with free trade that is remarkably similar to the Supreme Court's doctrine.[31] Yet the Court of Justice did not sacrifice environmental protection for the principle of free

28. *See* Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 Am. J. Comp. L. 205, 210 (Spring 1990) ("At present, the constitutional character of the European Community Treaties stands beyond doubt."); *infra* part I.A.

29. Treaty Establishing the European Community, Mar. 25, 1957, arts. 30-36, 1992 O.J. (C 224) 1, [1992] 1 C.M.L.R. 573 (1992) [hereinafter EC Treaty]. Unlike the Commerce Clause, the EC Treaty does not grant the Community plenary power to restrict or advance the free movement of goods nor the power to authorized the Member States to do so. Both the Community and the Member States are limited to the restrictions permitted by the treaty. *See* Case C-51/93, Meyhui NV v. Schott Zwiesel Glaswerke AG, 1994 E.C.R. I-3879, I-3898.

30. The only secondary Community law that addresses the disposal or movement of nonhazardous wastes has either been held by the European Court of Justice not to preempt Member State action or clearly allows Member State action. The Court of Justice held that Council Directive 75/442 EEC on waste disposal, as amended by Council Directive 91/156 EEC, 1991 O.J. (L 78) 32, did not preempt Member State action in the area of nonhazardous waste disposal. Case C-2/90, Commission v. Belgium (Walloon Waste), 1992 E.C.R. I-4431, I-4454, [1993] 1 C.M.L.R. 365 (1992). Council Regulation 259/93 EEC on the supervision and control of shipments of waste within, into, and out of the European Community, 1993 O.J. (L 30) 1, establishes a system of notification for transfrontier movement of waste but specifically allows Member States to "take measures in accordance with the Treaty to prohibit generally or partially or to object systematically to shipments of waste." *Id.* at art. 4, § 3(a)(i). In addition, the directive and the regulation were adopted under EC Treaty Article 130s which is restricted in scope by Article 130t to action that "shall not prevent any Member States from maintaining or introducing more stringent protective measures .... compatible with this Treaty." EC Treaty art. 130t (as in effect in 1993). Article 130t of the Treaty has not been changed by any amendments since 1993. *See* EC Treaty art. 130t (as in effect in 1996). Thus the Member States' enactment of environmental measures that restrict trade today remains limited only by the treaty provisions on the free movement of goods.

31. Damien Geradin, *Free Trade and Environmental Protection in an Integrated Market: A Survey of the Case Law of the United States Supreme Court and the European Court of Justice*, 2 J. Transnat'l L. & Pol'y 141, 191-92 (1993).

trade; it upheld Member State measures that restricted the flow of waste for purposes of protecting the environment and its citizens.[32]

This Note argues that the Supreme Court has made an unwise policy choice not required by its constitutional doctrine. The Note further argues that the Court should look to the European Court of Justice for a lesson in how to balance free trade and environmental protection in a federal system partially founded on the idea of an integrated market. It is time the teacher became the student. Part I establishes a foundation for comparing the roles of the Supreme Court and the European Court of Justice in protecting free trade. Part I then compares the Supreme Court's dormant Commerce Clause jurisprudence with the European Court of Justice's doctrine on the free movement of goods and reveals their significant similarities. Part II explores the Supreme Court's application of the dormant Commerce Clause in environmental protection cases, including cases involving the movement of waste. Part III examines the European Union's environmental policy, focusing on the proximity and self-sufficiency principles, and discusses why following those principles allows States[33] to attain efficient waste management and the overall reduction of waste generation. Part III also examines the Court of Justice's use of these principles in determining whether a measure that restricts the free movement of goods is necessary to protect the environment. Finally, part IV considers how the Supreme Court has failed to apply its dormant Commerce Clause jurisprudence properly in the context of the movement of waste. The Court has found nondiscriminatory measures to be discriminatory, has found economic protectionism where it does not exist, and has either failed to recognize the means necessary to protect health and the environment or altogether failed to discuss the propriety of the chosen means. Part IV then applies the Court of Justice's analysis to each of the measures struck down by the Supreme Court and finds that four out of five should be upheld as appropriate and necessary to the protection of the Earth and its inhabitants. This Note concludes that the Supreme Court should recognize state waste management schemes that implement the proximity and self-sufficiency principles as constitutional restrictions on the free movement of goods.

32. *See Walloon Waste*, 1992 E.C.R. at I-4481. In *Walloon Waste*, the Court of Justice noted the Community policies of proximity and self-sufficiency, recognized the cumulative effects of waste disposal and the consequent disposal crisis, and acknowledged that a total ban of foreign waste could be an appropriate and necessary means of protecting the environment and guarding human safety. *Id.* at I-4478 to I-4481. For a detailed discussion of the *Walloon Waste* case, see *infra* part III.C.

33. For purposes of this note, the term "State" refers to constituent states of both the United States and the European Union. "Member State" refers only to the constituent states of the EU and "state" refers only to the constituent states of the United States.

I. COMPARING THE DOCTRINES OF THE UNITED STATES SUPREME COURT AND THE EUROPEAN COURT OF JUSTICE

At first glance, the European Union looks like a group of sovereign nations loosely bound by an international treaty aimed at removing trade barriers. With further inspection, however, a government of divided powers operating under the rule of law emerges from the dust of World War II and the European Community Treaties. Because the United States represents the classic federal system, the United States experience has been a guiding force in the evolution of the "New Europe." The consequent similarities make for fruitful comparison.

A. *Federalism in the European Union*

Federalism has been defined as "a system of divided powers . . . proceed[ing] from the very essence of constitutionalism, which is limited government operating under the rule of law."[34] According to Koen Lenaerts, a leading scholar in constitutionalism and comparative law, "Federalism is present whenever a divided sovereignty is guaranteed by the national or supranational constitution and umpired by the supreme court of the common legal order."[35] The United States is probably the most well-known example of a federal system, and today clearly fits this description.[36] The United States Constitution divides

34. Lenaerts, *supra* note 28, at 205 (footnote omitted) (citing Laurence H. Tribe, American Constitutional Law 2 (1988)).

35. *Id.* at 263. Professor Lenaerts is a judge on the Court of First Instance in Luxembourg. The Court of First Instance hears and determines "certain classes of action or proceeding," subject to appeal to the Court of Justice. EC Treaty art. 168a.

Professor Lenaert's definition provides minimum requirements for a federal system. Professor Roger J. Goebel presents a more specific definition of federalism that the Member States accept as characterizing the European Union:

> A federal system is one in which: 1) a constitution, or other constitutive document or documents, is, or are, generally recognized to delineate the powers of a political structure . . .; 2) the constitutive states transfer some of their sovereignty . . . to the central political structure; and 3) the central structure exercises a substantial degree of legislative or regulatory, executive or administrative, and judicial or quasi-judicial authority.

Roger J. Goebel, *The European Community and Eastern Europe: "Deepening" and "Widening" the Community Brand of Economic Federalism*, 1 New Eur. L. Rev. 163, 167 (1993).

36. In the early days of the United States under the Constitution, principles like judicial review and implied federal powers that are today well-established were not universally agreed upon. Justice Marshall established the validity of these principles under the Constitution in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (holding that the courts have the power of judicial review), and McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819) (holding that the constitution grants the federal government implied powers), only after considerable debate. Indeed in *McCulloch*, when Maryland argued that the "powers of the general government . . . are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion," *id.* at 402, Justice Marshall had to "remind" Maryland that "it is *a constitution* we are expounding," *id.* at 407 (emphasis in original).

sovereignty between the states and the central government and provides the rule of law governing the people and their government. The preamble to the Constitution guarantees its supremacy by confirming that "the People . . ., in Order to form a more perfect Union, . . . do ordain and establish this Constitution for the United States of America."[37] The Supreme Court acts as umpire by interpreting the rule of law and striking the balance of powers accordingly.

The European Union does not fit as readily into this framework for a federal system. First, the union was formed by a series of treaties,[38] which generally does not operate as a constitution.[39] Second, the Treaty does not provide for its supremacy nor its direct application to the people of the union. The Member States formed the union, not the people: "By this Treaty, the High Contracting Parties establish among themselves a European Union."[40] Although the preambles to the TEU and the EC Treaty speak of forming "an ever closer union among the *peoples* of Europe,"[41] the Heads of State are the actors.

These potential deficiencies, however, were rectified by the European Court of Justice in its early case law. In the landmark case, *van Gend & Loos v. Nederlandse administratie der belastingen*,[42] the Court of Justice established that the EEC (now EC) Treaty was "more than an agreement which merely creates mutual obligations between the contracting states."[43] The court grounded its view in "the preamble to

37. U.S. Const. pmbl.

38. The European Union actually rests on a series of treaties. The first three treaties consisted of the Treaty instituting the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140, the Treaty establishing the European Atomic Energy Community, Mar. 25, 1957, 297 U.N.T.S. 259, and the Treaty establishing the European Economic Community Treaty, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]. These treaties have been amended several times, always moving toward a stronger federal system. The most notable amendments were the Single European Act, Feb. 17, 1986, 1987 O.J. (L 169) 1 [hereinafter SEA] and the Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 224) 1 [hereinafter TEU]. The institutional structure and system of law rest primarily on the EEC Treaty as amended by the SEA and Article G of the TEU. Article G of the TEU changes the name of the treaty from the European Economic Community (EEC) Treaty to the European Community (EC) Treaty. TEU art. G.

39. The parties to a treaty are generally bound by public international law which allows for derogation from the treaty if one party fails to act and allows laws enacted later in time to override the treaty. *See* George A. Bermann et al., Cases and Materials on European Community Law 204-06 (1993). For an exhaustive discussion of Member State reception of Community law, see *id.* at 206-44.

40. TEU art. A.

41. EC Treaty pmbl. (emphasis added); TEU pmbl. (emphasis added).

42. Case 26/62, 1963 E.C.R. 1, [1963] 2 C.M.L.R. 105 (1963).

43. *Van Gend & Loos*, 1963 E.C.R. at 12. Although the European Court of Justice most often discusses the constitutional nature of the EEC (now EC) Treaty, all of the treaties in combination form the constitutional charter. The EC Treaty, however, creates the Community institutions, divides power between the Community and the Member States, and provides most of the principles under which the system operates. This Note, therefore, compares the relevant provisions of the United States Constitution with those of the EC Treaty.

the Treaty which refers not only to governments but to peoples . . . [and] more specifically [in] the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens."[44] The court went on to say that the Treaty, independent of the Member States,

> not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.[45]

Ultimately, the court concluded that the Community "constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights."[46] In one fell swoop, the Court of Justice established that the EEC (now EC) Treaty guaranteed a system of dual sovereignty and had direct application to the citizens of the Member States.

Soon after, the Court of Justice reinforced and expanded the constitutional character of the Treaty in *Costa v. Ente Nazionale Energia Elettrica*.[47] In *Costa*, the court went beyond the notion of dual sovereignty and direct treaty application and announced the principle of Treaty supremacy:

> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights . . . and have thus created a body of law which binds both their nationals and themselves.[48]

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44. *Id.*

45. *Id.*

46. *Id.* In later cases where the court discusses the "new legal order" of the treaties, it does not use the language "of international law," but rather refers to a new "legal system." *See* Case 6/64, Costa v. Ente Nazionale Energia Elettrica, 1964 E.C.R. 585, 593, [1964] 3 C.M.L.R. 425 ("By contrast with ordinary international treaties, the EEC Treaty has created its own legal system . . . ."); *see also* Case 294/83, Parti écologiste "Les Verts" v. European Parliament, 1986 E.C.R. 1339, 1366, [1987] 2 C.M.L.R. 343 (speaking of "the spirit of the Treaty . . . and . . . its system").

47. Case 6/64, 1964 E.C.R. 585, [1964] 3 C.M.L.R. 425 (1964).

48. *Costa*, 1964 E.C.R. at 593. The court found this principle in Article 5 of the EEC (now EC) Treaty which states:

> Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
>
> They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.

EC Treaty art. 5. The court held that this mandate applied to the Member State courts and as a result those courts could not uphold a national law in conflict with the Treaty or secondary Community law. *Costa*, 1964 E.C.R. at 593-94, 599-600.

In the ensuing decades, the Court of Justice continued to interpret the Treaties as a constitution and after some resistance, the Member States have accepted the interpretation.[49]

The final step toward federalism is the existence of a judicial umpire with the power to interpret the constitution and thus preserve the balance of powers both between the central government and its constituent entities and between the institutions of the general government if they are separate.[50] The European Court of Justice has clearly taken on this role. In *Parti écologiste 'Les Verts' v. European Parliament*,[51] the Court of Justice confirmed its power of judicial review over the actions of the Community and the Member States: "[T]he [EC] is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty."[52]

Today, "the constitutional character of the European Community Treaties stands beyond doubt."[53] The federal nature of the European Union's system of government should also stand beyond doubt even though the European Union refuses to use the term federal to describe itself.[54] The Treaties form a constitution that permanently guarantees dual sovereignty between the Member States and the central institutions of the Community (the Council, the Commission, the Parliament, and the Court of Justice); the central institutions have the power to enact laws and to administer and judge those laws; the Treaty and laws pursuant to the Treaty are supreme and may preempt national law; and the European Court of Justice has the power to review both Community and national law to determine its validity under the Treaty. The European Court of Justice itself best summarizes the federal characteristics of the European Union:

> [T]he EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a

49. *See* Bermann, *supra* note 39, at 206; Goebel, *supra* note 35, at 172.

50. The European Court of Justice has interpreted the Treaties to include the principles of both horizontal (intra-institutional) and vertical (Community-Member State) separation of powers. Lenaerts, *supra* note 28, at 208-09.

51. Case 294/83, 1986 E.C.R. 1339, [1987] 2 C.M.L.R. 343 (1986).

52. *"Les Verts"*, 1986 E.C.R. at 1365. EC Treaty Article 173 states that "[t]he Court of Justice shall review the legality of acts [of the Community institutions]." EC Treaty Article 177 states that where a question on "the interpretation of this Treaty . . . [or] acts of the institutions of the Community" is raised, the Member State court or tribunal of last resort "shall bring the matter before the Court of Justice."

53. Lenaerts, *supra* note 28, at 210; *see also* Trevor C. Hartley, *Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community*, 34 Am. J. Comp. L. 229, 231 (1986) ("The Constitution of the Community takes the form of a series of international treaties."); Eric Stein, *Treaty-Based Federalism, A.D. 1979: A Gloss on Covey T. Oliver at the Hague Academy*, 127 U. Pa. L. Rev. 897, 900-05 (1979) (discussing the constitutional nature of certain treaties).

54. *See Goebel*, *supra* note 35, at 166, 168-69 (describing the fear of the word federal because today it connotes a particularly strong central government).

> Community based on the rule of law. The Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions.[55]

The Court of Justice's role in the European Union's federal system of government is that of interpreter of the constitution and umpire between the Member States and the Community institutions and is thus comparable to the Supreme Court's role in the United States Government.

B. *Constitutional Protection of Free Trade Among the Several States*

Before the Constitution, the American States were independent sovereigns bound only by the Articles of Confederation, which provided a weak central body that lacked legislative power and dealt only with military and foreign affairs.[56] At first, the states banded together out of necessity to secure their collective independence. The Treaty of Paris in 1783, however, officially ended the need for wartime cooperation and left each state to pursue its own economic and political interests.[57] Each state began to legislate "according to its . . . own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view."[58] The time was marked by commercial warfare between the states. This situation so threatened the union that it is almost uniformly thought to be the primary reason for the Constitutional Convention.[59]

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55. Opinion delivered pursuant to the second subparagraph of Article 228(1) of the Treaty (European Economic Area Opinion), Opinion 1/91, 1991 E.C.R. I-6079, I-6080-81, [1992] 1 C.M.L.R. 245 (1991).

56. Kermit L. Hall, The Magic Mirror: Law in American History 65 (1989). The Articles of Confederation stated that "each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." Stone et al., Constitutional Law Second Edition 2 (1991) (quoting the Articles of Confederation).

57. *See* Hall, *supra* note 56, at 65.

58. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533 (1949) (quoting 1 J. Story, Commentaries on the Constitution of the United States § 259, at 240 (1833)).

59. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979) (citing the central concern over the economic balkanization that "had plagued relations among the Colonies and later among the States under the Articles of Confederation" as an "immediate reason for calling the Constitutional Convention"); *H.P. Hood*, 336 U.S. at 533 ("The sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was 'to take into consideration the trade of the United States . . . .'"); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 224 (1824) (asserting that the states' having power over commerce resulted in self-serving actions that threatened the union and led to the constitutional convention). Justice Johnson, in a concurring opinion in *Gibbons*, remarked:

Similarly, before the EC Treaty, the nations of Europe were independent sovereigns pursuing their own economic and political interests. After World War II, however, Europe fell into a state of economic and political turmoil.[60] Extensive destruction of capital stock, damage to transport capital, neglect of research and development, and finally, the loss of twenty million people left Europe at a great disadvantage economically.[61] Furthermore, the Cold War, the partition of Europe, and the decolonization of Africa, the Caribbean, and Asia disrupted or destroyed markets and created political unrest.[62] These circumstances led to a desire for the strength that European unity and particularly economic integration could provide,[63] and prompted the formation of the European Coal and Steel Community and then a more comprehensive plan seeking "common action to eliminate the barriers which divide Europe."[64]

The United States under the Constitution and the European Community (now European Union) under the EC Treaty were founded on a desire to break down barriers between constituent members and to create a unified market. The principles of free trade among the States and economic unity are therefore fundamental to the existence of the United States and the European Union.[65] As such, the constitutional charters of both systems prohibit States from unduly restricting free

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> [F]inding themselves in the unlimited possession of those powers over their own commerce, . . . that selfish principle . . . began to show itself in iniquitous laws and impolitic measures, from which grew up a conflict of commercial regulations, destructive to the harmony of the States, and fatal to their commercial interests abroad. This was the immediate cause that led to the forming of the convention.

Gibbons, 22 U.S. (9 Wheat.) at 224 (Johnson, J., concurring).

60. Bermann, *supra* note 39, at 3; Allan M. Williams, The European Community: The Contradictions of Integration 14 (1991).

61. Williams, *supra* note 60, at 14-15.

62. *Id.* at 16.

63. *Id.* at 18-21.

64. Bermann, *supra* note 39, at 5, 8 (quoting EEC Treaty pmbl.); Williams, *supra* note 60, at 21-29.

65. *See* Case 240/83, Procureur de la République v. Association de défense des brûleurs d'huiles usagées (Waste Oils), 1985 E.C.R. 531, 548, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,164 (1985) (noting that "the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law."); *infra* Part I.C.1 (describing the Supreme Court's enunciation of a constitutional principle of free trade). *But see* Eule, *supra* note 22, at 434 (arguing that Congress' plenary power under the Commerce Clause to restrict free trade among the states implies that free trade and a national market cannot be fundamental constitutional values). Unlike the United States Constitution, the EC Treaty expressly protects free trade from undue interference by constituent states or by the central government. Case C-51/93, Meyhui NV v. Schott Zwiesel Glaswerke AG, 1994 E.C.R. I-3879, I-3898 ("It is settled law that the prohibition of quantitative restrictions and of all measures having equivalent effect applies not only to national measures but also to measures adopted by the Community institutions."). Under Eule's analysis then, the principles of free trade and market unity are even more fundamental to the European Union than they are to the United States.

trade and, more specifically to this Note, the free movement of goods: the United States Constitution does so in the negative implications of the Commerce Clause;[66] the EC Treaty does so in Article 30's and Article 34's express prohibitions against quantitative restrictions on the free movement of goods.[67]

C. *Constitutional Limits on Restrictive State Measures*

Although the free movement of goods may be considered a fundamental objective in the United States and the European Union, neither the Constitution nor the EC Treaty make it immune from restriction by the constituent States. The extent to which the Constitution and the EC Treaty limit the ability of states and Member States, respectively, to enact measures that restrict the free movement of goods is an inquiry left to the final arbiters of constitutional questions, the supreme courts of the central legal orders.

1. The Supreme Court's Review of Restrictive State Measures Under the Dormant Commerce Clause

The Constitution does not expressly protect free trade nor articulate any free market ideal for the United States. This lack of explicit protection has been called one of the "great silences of the Constitution."[68] The Supreme Court, however, "has advanced the solidarity and prosperity of this Nation by the meaning it has given to [that] silence[ ]."[69] In the few words of the Commerce Clause,[70] the Supreme Court has found not only a positive grant of power to Congress, but also an implied prohibition against state interference with interstate commerce.[71] This negative implication has been dubbed the "dormant," "negative," or "silent" Commerce Clause[72] and is

66. *See infra* part I.C.1.

67. Article 30 states: "Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States." EC Treaty art. 30. Article 34 states: "Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States." EC Treaty art. 34. For an explanation of the meaning given these words by the European Court of Justice, see *infra* part I.C.2.

68. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 535 (1949).

69. *Id.*

70. "The Congress shall have the Power To . . . regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cls. 1-3.

71. *See* Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992) ("It is long established that, while a literal reading evinces a grant of power to Congress, the Commerce Clause also directly limits the power of the States to discriminate against interstate commerce."); Maine v. Taylor, 477 U.S. 131, 137 (1986) ("Although the Clause thus speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade." (quoting Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35 (1980))).

72. Eule, *supra* note 22, at 425 n.1. The word dormant, although it is the least appropriate, is the most commonly used term to describe this prohibitive aspect of the Commerce Clause. *Id.* This note adopts the common usage.

grounded in the framers' intent to end the balkanization of the states under the Articles of Confederation.[73]

This Commerce Clause interpretation has led to much conflict with state legislation because the clause's limitation on state regulatory power "is by no means absolute"[74] yet the clause "does not say what the states may or may not do in the absence of congressional action."[75] The Supremacy Clause clearly provides for federal preemption of a state measure when the state measure conflicts with a federal statute.[76] Alternatively, Congress may give states the power to restrict interstate commerce in a manner that would otherwise violate the Commerce Clause as long as Congress makes its intent to do so "unmistakably clear."[77] When Congress has been silent, however, "the States retain authority under their general police powers to regulate matters of 'legitimate local concern' even though interstate commerce may be affected."[78] In this situation, the Court must provide meaningful interpretation of the limits imposed upon the states by the dormant Commerce Clause.

Scholars disagree on the proper basis for Supreme Court review of state measures under the dormant Commerce Clause. The bases most often advocated are protection of fundamental rights and representation-reinforcement.[79] Still others deny the existence of a dormant Commerce Clause and argue that the Court has no business making

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73. *See supra* part I.B.

74. *Taylor*, 477 U.S. at 138 (quoting Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 36 (1980)).

75. H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 535 (1949).

76. U.S. Const. art. VI.

77. C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677, 1691 (1994) (O'Connor, J., concurring) ("Congress must be 'unmistakably clear' before we will conclude that it intended to permit state regulation which would otherwise violate the dormant Commerce Clause."); *Taylor*, 477 U.S. at 138 ("It is well established that Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid. . . . But . . . this Court has exempted state statutes from the implied limitations of the Clause only when the Congressional direction to do so has been 'unmistakably clear.'").

78. *Taylor*, 477 U.S. at 138 (quoting *BT Inv. Managers*, 447 U.S. at 36); *see also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 204 (1824) ("[I]f a State, in passing laws on subjects acknowledged to be within its control, [i.e. police powers,] . . . shall adopt a measure of the same character as Congress may adopt, it . . . derive[s] its authority from the particular power . . . which remains with the State, and may be executed by the same means.").

79. *See, e.g.*, Eule, *supra* note 22, at 428 (arguing that the dormant Commerce Clause is appropriate only as a vehicle to protect the unrepresented interests in a state and then only as an adjunct to the Privileges and Immunities Clause); Steven G. Gey, *The Political Economy of the Dormant Commerce Clause*, 17 N.Y.U. Rev. L. & Soc. Change 1, 79 (1989-90) (advocating increased use of the dormant Commerce Clause to protect economic unity); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1093, 1174-80 (1986) (arguing that the dormant Commerce Clause applies only to purposeful economic protectionism because freedom from economic protectionism is a fundamental principle).

the policy choices involved in balancing legitimate state interests with free trade.[80] The Court relies on aspects of each approach to justify its novel method of balancing the free movement of goods across state lines with the states' power to protect the environment and the health and safety of its citizens.[81]

The Court uses a two-step approach when dealing with state measures that affect interstate commerce. The Court first asks whether the measure is discriminatory. The answer to this question determines the level of scrutiny to be applied. Discriminatory measures then receive strict scrutiny whereas evenhanded measures receive a much lower level of scrutiny in the form of a balancing test between local benefits and burdens on interstate commerce.

a. *Discriminatory Measures*

If a state measure is facially discriminatory or discriminatory in practical effect, the Court applies strict scrutiny and will uphold the measure only if the state proves that the measure advances a legitimate local interest and no adequate nondiscriminatory alternatives exist.[82] The Court first articulated this test in *Dean Milk Co. v. City of Madison*.[83] In *Dean Milk*, the city of Madison, Wisconsin enacted an ordinance prohibiting the sale of milk pasteurized more than five miles from the central square of Madison, avowedly to protect the quality of the milk and thus the health, safety and well-being of local communities.[84] The Court accepted the concern over the sanitary regulation of milk and milk products as a legitimate local interest.[85] The Court then determined that, although the ordinance was facially neu-

80. *See* Richard B. Collins, *Justice Scalia and the Elusive Idea of Discrimination Against Interstate Commerce*, 20 N.M. L. Rev. 555, 557 (1990) (discussing Justice Scalia's argument against the dormant Commerce Clause for lack of textual support); Eule, *supra* note 22, at 428 (arguing that the better clause for protecting out-of-staters is the Privileges and Immunities Clause).

81. *See, e.g.*, *Taylor*, 477 U.S. at 139 ("[A]ny relaxation in the restrictions on state power . . . imposed by the Commerce Clause unacceptably increases 'the risk that unrepresented interests will be adversely affected by restraints on commerce.'" (quoting South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 92 (1984))); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533-35 (1949) (describing free trade as a constitutional value protected by the Commerce Clause)

82. *Taylor*, 477 U.S. at 138 (stating that a facially discriminatory measure may be upheld if it serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives (citing Sporhase v. Nebraska, 458 U.S. 941, 957 (1982); Hughes v. Oklahoma, 441 U.S. 322, 336 (1979); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 353 (1977); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951))); *Dean Milk*, 340 U.S. at 354 (stating for the first time the standard that measures discriminatory on their face or in practical effect cannot be upheld "if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available"). This test requires that states use the means least restrictive of interstate commerce yet still effective in achieving a legitimate goal.

83. 340 U.S. 349 (1951).

84. *Id.* at 350, 353.

85. *Id.* at 353.

tral because it applied to milk produced anywhere, "[i]n . . . erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminate[d] against interstate commerce."[86]

Having found the measure to be discriminatory in practical effect, the Court announced the following test: local government cannot enact discriminatory measures, "even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available."[87] The Court found that adequate nondiscriminatory alternatives such the inspection and certification system recommended by the United States Public Health Service (the "Model Milk Ordinance") did exist.[88] The majority relied on the Madison Health Commissioner's testimony that "consumers 'would be safeguarded adequately' under either proposal" and on the milk sanitarian of the Wisconsin State Board of Health's testimony recommending a measure based on the Model Milk Ordinance.[89] The dissent argued that the record was insufficient to determine whether the alternative solutions suggested by the Court were adequate and asserted that "judicial knowledge" could not replace evidence of the "relative merits of the Madison ordinance and the alternatives suggested by the Court . . . ."[90] Based on its review of the available evidence, however, the Court held the ordinance unconstitutional.[91]

In *Hunt v. Washington State Apple Advertising Commission*,[92] the Court used the same test to strike down another facially neutral yet discriminatory[93] statute prohibiting the display of the Washington State apple grade on closed containers:[94]

> When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake. North Carolina has failed to sustain that burden on both scores.[95]

The Court found that North Carolina's proffered interest of consumer protection would be legitimate if the North Carolina statute protected

86. *Id.* at 354.
87. *Id.*
88. *Id.* at 354-56.
89. *Id.* at 355-56.
90. *Id.* at 359-60.
91. *Id.* at 356.
92. 432 U.S. 333 (1977).
93. The statute was again facially neutral but discriminatory in effect because it raised the cost of doing business in North Carolina for Washington apple growers and protected North Carolina growers from competition with growers of higher grade apples. *Id.* at 350-52.
94. *Id.* at 337.
95. *Id.* at 353 (citations omitted).

the consumer at all. The Court implied that the statute so poorly served the alleged interest that it could not have been the primary goal and that economic protectionism was more likely the statute's goal. The availability of numerous superior, not just adequate, alternatives sealed the statute's fate.[96]

In *City of Philadelphia v. New Jersey*,[97] the Court created an even stricter test for measures it considered arbitrarily discriminatory. New Jersey banned the importation of most solid and liquid waste for the professed purpose of protecting the environment and the health and safety of its citizens from the accumulation of waste in its overburdened landfills.[98] The Court never even cited the general rule to be applied to state laws that discriminate against interstate commerce. The critical inquiry, rather, was whether the measure was "basically a protectionist measure, or whether it [could] fairly be viewed as a law directed to legitimate local concerns" with only incidental effects on interstate commerce.[99] The Court proceeded to deem irrelevant the legislative purpose because "the evil of protectionism can reside in legislative means as well as legislative ends."[100] Thus, if the state did not have a legitimate reason to distinguish between domestic and foreign goods, the statute amounted to arbitrary discrimination or "simple economic protectionism" and was subject to a "virtually per se rule of invalidity."[101] Asserting that the harms to be prevented by New Jersey's statute arose after disposal when out-of-state waste was indistinguishable from in-state waste,[102] the Court held that New Jersey had arbitrarily discriminated against out-of-state waste by banning out-of-state waste while leaving its landfills open to in-state waste.[103]

Aside from distinguishing between the harm caused by out-of-state and in-state goods, the Court left open one other option to avoid application of the per se invalidity rule. The Court admitted that New Jersey might be able to constitutionally prohibit waste importation

96. *Id.* at 353-54.
97. 437 U.S. 617 (1978).
98. *Id.* at 625. The statute set out its purpose as follows:
> The Legislature finds and determines that . . . the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatment and disposal within this state of all wastes generated outside of the State be prohibited.

N.J. Stat. Ann. § 13:1I-9 (West 1978).
99. *Philadelphia*, 437 U.S. at 624.
100. *Id.* at 626.
101. *Id.* at 623-24.
102. *Id.* at 629.
103. *Id.* at 626-27.

under the quarantine precedents[104] if "the very movement of waste into or through New Jersey endangers health, or . . . [if] waste must be disposed of as soon and as close to its point of generation as possible."[105]

Only one year after *Philadelphia*, the Court in *Hughes v. Oklahoma*[106] clearly set forth the *Dean Milk* "no adequate alternatives" test as the general rule for discriminatory statutes:

> Under that general rule, we must inquire (1) whether the challenged statute regulates evenhandedly . . . or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce. . . . [W]hen considering the purpose . . . , this Court . . . will determine for itself the practical impact of the law.[107]

The Court then applied the test to strike down a facially discriminatory Oklahoma statute that forbade the export for sale of minnows caught in the state.[108] The Court noted the heightened scrutiny—virtual per se invalidity—announced in *Philadelphia*[109] for statutes employing discriminatory means without a legitimate reason to distinguish in-state and out-of-state goods, but did not follow this reasoning. It did not distinguish between in-state and out-of-state minnows; it applied the general rule and found adequate nondiscriminatory alternatives.[110]

Maine v. Taylor[111] also applied the general rule to a facially discriminatory statute prohibiting the importation of baitfish into Maine.[112] The Court limited the *Philadelphia* per se invalidity rule to measures that amount to "simple economic protectionism" and measures that

104. States had long been able to prohibit the importation of items "which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as . . . provisions that are . . . unfit for human use or consumption." Bowman v. Chicago & N.W. Ry., 125 U.S. 465, 489 (1888).

105. *Philadelphia*, 437 U.S. at 629. The Court here, without knowing it, aptly summarizes the proximity principle, which forms part of the European Community's environmental policy and contributed to the European Court of Justice's finding that a waste import ban was necessary to protect the environment. See *infra* part III for a description of these policies and the Court of Justice's use of the policies in making its determinations.

106. 441 U.S. 322 (1979).

107. *Id.* at 336.

108. *Id.* at 338. Although conservation of resources was a legitimate local purpose, many effective alternatives existed to serve that interest. *Id.*

109. *Id.* at 337 ("Such facial discrimination by itself may be a fatal defect . . . ." (citing *Philadelphia*, 437 U.S. at 626)).

110. *Id.* at 336-38.

111. 477 U.S. 131 (1986).

112. *Id.* at 138.

"discriminat[e] arbitrarily against interstate trade."[113] The court then proceeded to analyze the measure under the general rule because

> [n]ot all intentional barriers to interstate trade are protectionist . . . and the Commerce Clause "is not a guaranty of the right to import into a state whatever one may please . . . regardless of the effects of the importation upon the local community." Even overt discrimination against interstate trade may be justified where, as in this case, out-of-state goods or services are particularly likely for some reason to threaten the health and safety of a State's citizens or the integrity of its natural resources . . . .[114]

The Court distinguished *Philadelphia* based on Maine's legitimate reasons for treating out-of-state baitfish differently than native baitfish, namely the parasite commonly found in foreign but not native fish.[115]

The Court went on to find Maine's interest in "guarding against imperfectly understood environmental risks"[116] to be a legitimate local concern and then thoroughly examined the availability of less discriminatory alternatives. The appellee argued that procedures for inspection could easily be developed and that farm grown baitfish should be allowed into Maine because they did not create a significant risk to native Maine species.[117] In response to the appellee's first argument, the Court noted that

> the "abstract possibility," of developing acceptable testing procedures, particularly when there is no assurance as to their effectiveness, does not make those procedures an '[a]vailabl[e] . . . nondiscriminatory alternative' . . . . A State must make reasonable efforts to avoid restraining the free flow of commerce across its borders, but it is not required to develop new and unproven means of protection at an uncertain cost.[118]

As to the second argument, the uncertainty of the scientific evidence led the Court to defer to the Maine legislature's choice to include farm grown baitfish in the ban.[119] The *available* nondiscriminatory alternatives could not clearly protect Maine's environment as ade-

113. *Id.* at 148 & n.19 (citing *Philadelphia* and *Hughes* as examples). The *Taylor* Court describes laws improperly motivated by the economic protection of local industries as "economic protectionism" and laws that may be motivated by legitimate concerns but discriminate without distinguishing in-state from out-of-state goods as "discriminating arbitrarily." *Id.*

114. *Id.* at 148 n.19 (quoting Robertson v. California, 328 U.S. 440, 458 (1946)).

115. *Id.* at 148 & n.19, 151-52.

116. *Id.* at 148.

117. *Id.* at 142, 147.

118. *Id.* at 147-48 (alteration in original) (citations omitted). The Court also noted that "'[T]he constitutional principles underlying the commerce clause cannot be read as requiring the State of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences.'" *Id.* at 148 (quoting United States v. Taylor, 585 F. Supp. 393, 397 (D. Me. 1984)).

119. *Id.*

quately as the Maine legislature's chosen means; thus, the measure was a constitutional restriction of the free movement of goods.

Since *Taylor*, the Supreme Court has heard only four cases on discriminatory measures that restrict the free movement of goods allegedly for purposes other than economic protectionism, and all have been concerned with the free movement of waste. Although at times the Court cites the general rule set forth in *Dean Milk* and suggests adequate alternatives, it never clearly follows the general rule but instead follows *Philadelphia*. In applying the *Philadelphia* analysis, it adheres to the outcome, never addressing the exceptions therein to the per se invalidity rule.[120] These cases will be discussed in depth in part II.B and part IV.

b. *Evenhanded Measures*

Not all local measures are discriminatory. If a measure is an evenhanded attempt to serve a legitimate local interest, the Court applies much lower scrutiny. *Pike v. Bruce Church, Inc.*[121] sets forth the balancing test used by the Court to assess nondiscriminatory measures:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . [T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[122]

In *Pike*, an Arizona statute required that Arizona-grown cantaloupes be packaged in standard containers showing their origin. The purpose was to enhance the reputation of Arizona cantaloupes, thereby promoting a local industry. The effect was to prohibit cantaloupe growers from having their fruit packaged outside Arizona.[123] The Court found the statute nondiscriminatory but found its impact on interstate commerce clearly excessive in relation to the local benefit of enhanced reputation for Arizona cantaloupes.[124] "Such an incidental consequence of a regulatory scheme could perhaps be tolerated if a more compelling state interest were involved."[125]

Minnesota v. Clover Leaf Creamery Co.[126] applied the *Pike* test to a Minnesota statute prohibiting the sale of milk in nonreturnable, nonrefillable plastic containers but not other nonreturnable, nonrefil-

120. *See supra* part II.B.
121. 397 U.S. 137 (1970).
122. *Id.* at 142 (citation omitted).
123. *Id.* at 138, 143.
124. *Id.* at 146.
125. *Id.*
126. 449 U.S. 456 (1981).

lable containers (such as paper milk cartons). The purpose of the statute was to promote conservation and ease waste disposal problems.[127] There was evidence, however, that the statute's purpose was also to promote the Minnesota pulpwood industry.[128] The Court nevertheless upheld the statute under *Pike*. Although, "the out-of-state plastics industry [was] burdened relatively more heavily than the Minnesota pulpwood industry, . . . this burden [was] not 'clearly excessive' in light of the substantial state interest in promoting conservation . . . and easing solid waste disposal problems."[129]

Under the *Pike* test therefore, burdens on interstate commerce are generally tolerated unless the Court dislikes the "nature of the local interest." Protection of local economic interests by limiting access to local markets[130] or by requiring business to be conducted within the state that could just as easily be conducted elsewhere has led the Court to strike down evenhanded measures.[131] Protection of health, safety, and the environment, however, are always considered legitimate local interests and are usually upheld even where the burden on interstate commerce is relatively heavy.[132]

2. The European Court of Justice's Review of Restrictive Member State Measures Under EC Treaty Articles 30 to 36 and the Rule of Reason

The EC Treaty, unlike the United States Constitution, expressly prohibits the restriction of intracommunity trade.[133] Specifically, Articles 30 and 34 prohibit quantitative restrictions on imports, exports, and measures having equivalent effect between Member States.[134] The European Court of Justice in *Procureur du Roi v. Dassonville*[135] interpreted measures having equivalent effect to include "[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade."[136]

127. *Id.* 449 U.S. at 458-59.
128. *Id.* at 475.
129. *Id.* at 473.
130. Laurence Tribe, American Constitutional Law 415 (1988).
131. *Id.* at 426.
132. *See, e.g., Clover Leaf Creamery*, 449 U.S. at 473-74 (upholding ban of nonreturnable, nonreuseable plastic containers even though ban benefitted local industry because purpose of ban was to protect environment from plastic); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 444 & n.18 (1978) (noting that safety regulations are usually upheld because of a strong presumption of validity).
133. EC Treaty Articles 9-36 provide for the free movement of goods. Specifically, Article 9 calls for the creation of a customs union and the eventual prohibition of customs duties between Member States; Articles 12-17 provide for elimination of customs duties and measures having equivalent effect; Articles 30-36 provide for elimination of quantitative restrictions and measures having equivalent effect. EC Treaty Articles 48-73 provide for the free movement of workers, services and capital.
134. *See supra* note 67.
135. Case 8/74, 1974 E.C.R. 837, [1974] 2 C.M.L.R. 436 (1974).
136. *Dassonville*, 1974 E.C.R. at 852.

This broad definition captures any measure that makes it more difficult or costly to import or export goods from one Member State to another.[137]

This prohibition, however, is not absolute. The EC Treaty provides specific exceptions to Articles 30 and 34 in Article 36[138] and the European Court of Justice has further limited Articles 30 and 34 with the "rule of reason" it developed in *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*.[139]

a. *Article 36*

Article 36 allows Member States to restrict the free movement of goods for certain enumerated reasons such as public morality, public policy, and the protection of health and life of humans, animals, and plants.[140] The Court of Justice has interpreted Article 36 very narrowly, holding that it extends only to the enumerated justifications.[141] Measures that restrict the free movement of goods on the grounds listed in Article 36, however, are not automatically permitted. Two provisions in the article require further analysis of these measures: (1) "Articles 30 to 34 shall not preclude prohibitions or restrictions . . . *justified* on [the enumerated grounds];" and (2) "Such prohibitions or restrictions shall not . . . constitute a means of arbitrary discrimination or a disguised restriction on trade."[142] The requirement that the prohibitions or restrictions allowed under the article be "justified" and

137. *See, e.g.*, Case 247/81, Commission v. Germany, 1984 E.C.R. 1111, 1122, [1985] 1 C.M.L.R. 640 (1984) (including under Article 30's prohibition measures that make access to the domestic market conditional on the importer having an agent in the Member State); Case 12/74, Commission v. Germany, 1975 E.C.R. 181, 199-200, [1975] 1 C.M.L.R. 340 (1975) (including under Article 30's prohibition measures that confine names not indicative of origin or source to domestic products only). The Court of Justice narrowed the definition of measures having equivalent effect in Cases C-267/91 & C-268/91, Criminal Proceedings against Keck & Mithouard, 1993 E.C.R. I-6097, [1995] 1 C.M.L.R. 101 (1993), by excluding from Article 30 restrictions on "selling arrangements," i.e., marketing and advertising restrictions, provided they apply equally to all traders and products. This limitation does not effect the analysis in this Note, however, because measures restricting the movement of products/goods still clearly fall under Article 30.

138. EC Treaty art. 36. Article 36 reads:

> The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Id.

139. Case 120/78, 1979 E.C.R. 649, [1979] 3 C.M.L.R. 494 (1979).

140. EC Treaty art. 36.

141. *See* Case 124/81, Commission v. United Kingdom (UHT Milk), 1983 E.C.R. 203, 235, [1983] 2 C.M.L.R. 1 (1983).

142. EC Treaty art. 36 (emphasis added).

the disallowance of arbitrary discrimination have led the Court of Justice to apply the "principle of proportionality" to measures enacted on one of the grounds in Article 36.[143] This proportionality test requires that a measure be proportionate in relation to the objective pursued, i.e., that "the same result may [not] be achieved by means of less restrictive measures."[144] In other words, the measure must employ the least restrictive means "necessary to attain the legitimate aim."[145]

Article 36 does not require that the measure be evenhanded and the Court of Justice has not distinguished between discriminatory and nondiscriminatory measures in Article 36 cases. An evenhanded measure, however, is much more likely to be considered the least restrictive means of achieving a legitimate aim.

b. *The Rule of Reason*

The European Court of Justice created the rule of reason to deal with Member State concerns that were not fully developed when Article 36 was written but later became imperative.[146] Consumer rights and environmental protection, for example, did not become important concerns until the 1970s.[147] The court first articulated the rule of reason in the landmark case, *Cassis de Dijon*:

> Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be . . . recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumer.[148]

Only protection of public health clearly falls within Article 36 and defense of the consumer clearly does not fall within the Court's narrow interpretation of Article 36. *Cassis de Dijon* thus effectively expanded the categories of purposes for which a Member State may restrict the free movement of goods.

The rule of reason also included the proportionality analysis required under Article 36. Here again, the Court required that the measure employ the least restrictive means necessary to serve an

143. Case 174/82, Criminal Proceedings against Sandoz BV, 1983 E.C.R. 2445, 2463, [1984] 3 C.M.L.R. 43 (1983) (applying "the principle of proportionality which underlies the last sentence of Article 36 of the Treaty").

144. *UHT Milk*, 1983 E.C.R. at 236.

145. *Sandoz*, 1983 E.C.R. at 2463.

146. *See* Bermann, *supra* note 39, at 353. Article 36 was written in 1957. *Id.*

147. *Id.*

148. Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein (Cassis de Dijon), 1979 E.C.R. 649, 662, [1979] 3 C.M.L.R. 494 (1979). The term "mandatory requirements" has been better translated in later judgments as imperative state interests. *See* Bermann, *supra* note 39, at 356 n.2. Imperative state interests in this context are comparable to legitimate state interests in the United States.

imperative state interest.[149] Additionally, the Court of Justice refrained from distinguishing between discriminatory and evenhanded measures. The court thus used the same analysis to determine the validity of measures justified on the grounds of imperative state interests as it did to determine the validity of measures justified under Article 36.

Although *Cassis de Dijon* was not based on the discriminatory or nondiscriminatory nature of the German minimum alcohol content law, the law was evenhanded and later cases made evenhandedness a requirement under the rule of reason. The Court of Justice later maintained that imperative interests may be invoked as an exception to Article 30 only where "national rules, *which apply without discrimination to both domestic and imported products*, may be justified as being necessary in order to satisfy [those] imperative requirements."[150]

Some cases, however, undermine this condition on the rule of reason by failing to discuss the issue of discrimination at all and by establishing new definitions of discrimination. In *Commission v. Denmark (Danish Bottles)*,[151] for example, the Advocate General found a Danish law requiring that beer and soda be sold in returnable containers approved by the Danish government to be discriminatory in effect and therefore not eligible for rule of reason analysis.[152] The Court of Justice then upheld a portion of the law under the rule of reason without discussing the issue of discrimination.[153] In *Commission v. Belgium (Walloon Waste)*,[154] the Court of Justice again applied the rule of reason to a law that the Advocate General had found facially discriminatory.[155] The Belgian region of Wallonia had completely prohibited the import of out-of-region waste but the Court of Justice stated that the measure was not discriminatory because out-of-state waste differs from in-state waste.[156] Although this analysis seemingly created a new definition of nondiscrimination for purposes of using the rule of reason, most argue that the court simply applied the rule of reason to

149. *See Cassis de Dijon*, 1979 E.C.R. at 662.

150. Case 788/79, Criminal Proceedings against Gilli and Andres, 1980 E.C.R. 2071, 2078, [1981] 1 C.M.L.R. 146 (1980) (emphasis added); *see also* Case 16/83, Criminal Proceedings against Prantl, 1984 E.C.R. 1299, 1327, [1985] 2 C.M.L.R. 238 (1984) (requiring rules be "applicable to domestic and imported products alike" for justification under rule of reason).

151. Case 302/86, 1988 E.C.R. 4607, [1989] 1 C.M.L.R. 619 (1988).

152. *Danish Bottles*, 1988 E.C.R. at 4625 (opinion of Advocate General Sir Gordon Slynn).

153. *Id.* at 4630.

154. Case C-2/90, 1992 E.C.R. I-4431, [1993] 1 C.M.L.R. 365 (1992).

155. *See Walloon Waste*, 1992 E.C.R. at I-4457 (stating Advocate General Jacobs's opinion that the measure "is plainly not indistinctly applicable to domestic and imported products")

156. *See id.* at I-4480.

a facially discriminatory measure.[157] In either case, the court found the measure proportional and valid under the EC Treaty.[158]

c. *Proportionality Analyses*

The proportionality principle is at the heart of the Court of Justice's analysis of restrictive state measures. After the court has determined that the interest to be served falls under Article 36 or is legitimate under the rule of reason, it must weigh the burden on intracommunity trade with the benefit to the Member State to judge whether the measure employs the least restrictive means necessary to serve the identified interest.

In *Commission v. United Kingdom (UHT Milk)*,[159] the United Kingdom (the "U.K.") placed restrictions on the importation and sale of UHT Milk by requiring import licenses and packaging within the U.K. to guard against milk infected with cattle foot-and-mouth disease. The Court of Justice first noted that protecting health is justified under Article 36 only if the measure is proportional to its objective.[160] The court then examined all the scientific evidence presented and determined that the risk to health was minimal and thus the local benefit small.[161] The court suggested that certificates of quality ensuring that certain safety procedures had been followed in treating and packaging the milk would be adequate to protect U.K. citizens from infected milk.[162] The Court of Justice finally held that the law significantly impeded intracommunity trade and was more restrictive than necessary to protect health.[163]

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157. *Id.* at I-4457 (stating Advocate General Jacobs's opinion that the measure was discriminatory); Gerardin, *supra* note 31, at 189 (asserting that this is "the first time that the Court of Justice used the [rule of reason] to uphold a trade restriction facially discriminating against imports"); Peter von Wilmowsky, *Waste Disposal in the Internal Market: The State of Play After the ECJ's Ruling on the Walloon Import Ban*, 30 Common Mkt. L. Rev. 541, 556 (1993) (questioning the reasoning of the Court of Justice because "self-sufficient disposal regions represent a quantitative import restriction according to Article 30 EEC").

158. *See Walloon Waste*, 1992 E.C.R. at I-4479 to I-4480. This case is discussed in depth in the context of the European Court of Justice's environmental protection versus free movement of goods case law. *See infra* part III.C.

159. Case 124/81, 1983 E.C.R. 203, [1983] 2 C.M.L.R. 1 (1983). UHT stands for "ultra heat treated."

160. *UHT Milk*, 1983 E.C.R. at 236.

161. *Id.* at 238 (emphasizing the limited disparities in safety laws of Member States regarding UHT milk and the ability of UHT milk to remain at normal temperatures for long periods of time).

162. *Id.* at 236, 239.

163. *Id.* at 236, 240. In Case 261/85, Commission v. United Kingdom (Pasteurized Milk), 1988 E.C.R. 547, [1988] 2 C.M.L.R. 11 (1988), the Court held that a ban on the importation of pasteurized milk was disproportionate to the goal of protecting health and invalidated the measure. *Pasteurized Milk*, 1988 E.C.R. at 575-77; *cf.* Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (invalidating a local ordinance restricting the import of pasteurized milk).

In *Commission v. Germany (Crayfish Import Ban)*,[164] Germany prohibited the import of live crayfish for commercial purposes because it feared the spread of a crayfish plague that was widespread in the Community.[165] The court accepted Germany's interest in the protection of animals and stated the proportionality principle as follows:

> [R]ules restricting intra-Community trade are compatible with the Treaty only in so far as they are indispensable for the purposes of providing effective protection for the health and life of animals. They cannot therefore be covered by the derogation provided for in Article 36 if that aim may be achieved just as effectively by measures having less restrictive effects on intra-Community trade.[166]

The Court of Justice examined the alternatives suggested by the Commission and noted that Germany's legislation allowing derogation from the ban if certain safety measures were taken indicated that Germany found those measures sufficient to protect native crayfish.[167] The court then determined that the means found adequate by the Commission and Germany included less restrictive means such as inspecting random samples, requiring health certificates, or regulating the crayfish market.[168] The ban was therefore invalid.

To the contrary, the court in *Criminal Proceedings against CMC Melkunie BV*[169] permitted the Netherlands to bar imports of milk with certain levels of bacteria allowed in other Member States because "the data available at the present stage of scientific research do not make it possible to determine with certainty [the level of bacteria that is] a source of danger to human health."[170] Thus, when the evidence does not clearly show that less restrictive means would be sufficient to attain the level of protection deemed legitimate by the Court of Justice, the court defers to the Member State legislatures' decisions.

In *Danish Bottles*,[171] after confirming that environmental protection is an imperative state interest,[172] the Court of Justice examined a Danish law requiring that all containers for beer and soft drinks be returnable and be approved by the National Agency for the Protection of the Environment (the "NAPE"). The Advocate General found both

164. Case C-131/93, 1994 E.C.R. I-3303.
165. *Crayfish Import Ban*, 1994 E.C.R. at I-3316 to I-3317.
166. *Id.* at I-3321.
167. *Id.* at I-3323.
168. *Id.* at I-3322; *cf.* Maine v. Taylor, 477 U.S. 131, 151-52 (1986) (upholding import ban of live baitfish to protect from parasites because scientific evidence was inconclusive).
169. Case 97/83, 1984 E.C.R. 2367, [1986] 2 C.M.L.R. 318 (1984).
170. *Melkunie*, 1984 E.C.R. at 2386; *cf. Taylor*, 477 U.S. at 151-52 (upholding Maine's ban on importation of live baitfish because scientific data was inconclusive).
171. Case 302/86, 1988 E.C.R. 4607, [1989] 1 C.M.L.R. 619 (1988).
172. *Danish Bottles*, 1988 E.C.R. at 4607-08 (stating that protection of the environment is "'one of the Community's essential objectives,' which may, as such, justify certain limitations of the principle of the free movement of goods.... [T]he protection of the environment is a mandatory requirement.").

the compulsory deposit-and-return system and the NAPE inspection system discriminatory in effect and disproportional to the legitimate aim of encouraging recycling.[173] The Court of Justice did not discuss the issue of discrimination but analyzed the law under the rule of reason anyway. The court agreed that the NAPE inspection system was too restrictive because it forced producers not only to recover used bottles but also to conform its containers to one of the limited forms approved by the NAPE.[174] The deposit-and-return system, in contrast, was "an indispensable element of a system intended to ensure the re-use of containers and therefore appears necessary to achieve the aims pursued by the . . . rules. That being so, the restrictions which it imposes on the free movement of goods cannot be regarded as disproportionate."[175] In upholding the recycling system, the Court of Justice accepted a high level of environmental protection (recycling of all bottles) as a legitimate Member State interest.

In Article 30 cases, the European Court of Justice demands that the parties present evidence as to the necessity of the measure or the existence of adequate alternatives and then carefully reviews that evidence. The court defers to Member State legislative decisions when it accepts that the asserted interest is viable and when the evidence is either insufficient to determine the adequacy of available alternatives or shows that adequate alternatives do not exist.

3. A Similar Approach to Determining the Constitutional Limits on State/Member State Restrictions of Free Trade

The United States Supreme Court employs three different tests when determining the constitutional limits on state restrictions of free trade: (1) the *Philadelphia* "virtually per se invalidity" rule for arbitrarily discriminatory measures; (2) the *Dean Milk* "no adequate alternatives" test for other discriminatory measures; and (3) the *Pike* balancing test for evenhanded measures.[176] The European Court of Justice essentially uses one test when determining the constitutional limits on Member State restrictions of free trade—the proportionality test.[177] The Court of Justice's approach is very similar to the Supreme Court's "no adequate alternatives" rule. Both require that the State show a legitimate State interest and an absence of less restrictive adequate means. Although the Supreme Court lowers its scrutiny when a measure is evenhanded, it still balances the burden on interstate trade with the benefit to the state and takes into consideration the nature of the state's interest. The Court of Justice in its proportionality analysis also weighs the burden on intracommunity trade, which is lower when

173. *Id.* at 4625-26 (opinion of Advocate General Sir Gordon Slynn).
174. *Id.* at 4632.
175. *Id.* at 4630.
176. *See supra* part I.C.1.
177. *See supra* part I.C.2.

a measure is evenhanded, with the benefits to the Member State, taking into consideration the importance and authenticity of the specific interest at stake.

Discriminatory measures not justified under Article 36 but nevertheless founded on imperative state interests are generally not eligible for the proportionality test and are per se invalid. The Court of Justice, however, recently formulated a test for discrimination that led it to apply an analysis similar to the Supreme Court's analysis in *Maine v. Taylor*.[178] The *Taylor* Court first employed the *Philadelphia* test by differentiating the relevant in-state and out-of-state items to find the measure not *arbitrarily* discriminatory and then applied the *Dean Milk* analysis for discriminatory measures.[179] The Court of Justice distinguished in-state and out-of-state items to find a measure nondiscriminatory and therefore eligible for the proportionality analysis under the rule of reason.[180] Although the reason for distinguishing in-state from out-of-state items was different, the analysis and ultimate determinations were the same.

A comparison of cases with similar facts shows a marked similarity in the courts' approaches. *UHT Milk*, *Pasteurized Milk*, and *Dean Milk* all involved restrictions on the import and sale of milk treated outside the relevant local area. The European Court of Justice and the Supreme Court struck them down because the measures put a heavy burden on inter-State trade and less restrictive alternatives were adequate to protect human health.[181] *Crayfish Import Ban* and *Taylor* both concerned a ban on imports of non-native marine animals to protect the native population from disease. Both courts examined the scientific data and the current procedures for protection used in the respective States.[182] The Supreme Court found the data in *Taylor* to be inconclusive and noted that Maine had not developed an inspection program due to a lack of adequate technology at the time. It therefore deferred to the Maine legislature and upheld the ban as the only adequate alternative.[183] The Court of Justice found the data in *Crayfish Import Ban* sufficient to show that inspection and safety requirements would be adequate to protect German crayfish and noted that the German government already used these methods. It therefore found the measure disproportionate to the Member State goal and invalidated it.[184] Although the courts reached different results,

178. 477 U.S. 131 (1986).

179. *See supra* notes 111-19 and accompanying text.

180. *See* Case C-2/90, Commission v. Belgium (Walloon Waste), 1992 E.C.R. I-4431, I-4432, [1993] 1 C.M.L.R. 365 (1992).

181. *See supra* notes 83-90 and accompanying text (discussing *Dean Milk*); notes 159-63 and accompanying text (discussing *UHT Milk* and *Pasteurized Milk*).

182. *See supra* notes 111-19 (discussing *Taylor*); notes 164-68 (discussing *Crayfish Import Ban*).

183. *See supra* notes 111-19 and accompanying text.

184. *See supra* notes 164-68 and accompanying text.

the analysis was the same. In addition, where scientific data is unclear as to what action is necessary to protect a legitimate interest, like the Supreme Court in *Taylor*, the Court of Justice defers to Member State legislatures and upholds those measures. *Melkunie* is an example of this analysis.[185]

Danish Bottles and *Clover Leaf Creamery* both concerned even-handed laws that required the use of recyclable containers to encourage recycling and ease waste disposal problems. The Supreme Court and the European Court of Justice found the chosen means appropriate to their stated goals, which incorporated a high level of environmental protection.[186] The only distinguishing factor between the analyses is the Supreme Court's use of lower scrutiny; the Danish measure had to surpass a higher hurdle to be considered valid.

The European Court of Justice generally makes an evidence-based decision on the legitimacy of a local concern and the necessity of a given means. If evidence does not make it clear that an adequate alternative exists, the court defers to the Member State. Although the Supreme Court did the same in *Taylor* and *Clover Leaf Creamery*, it has not followed that route in its free movement of waste cases. The two courts' analyses and ultimate decisions in free movement of waste cases clearly diverge. This divergence is addressed in part IV.

II. The Supreme Court Fails To Protect the Environment from the Free Movement of Waste

Environmental concerns exploded on the U.S. political scene in the 1960s in response to ecological catastrophes.[187] On April 22, 1970, twenty million Americans celebrated the country's first Earth Day, hoping to "roll back environmental degradation."[188] Since then, environmental awareness has changed the way many people think and live, but how many people are aware of the waste disposal crisis? How many people have significantly reduced consumption in the last twenty-five years? Not enough.[189] In light of this, who is supposed to

185. *See supra* notes 169-70 and accompanying text.

186. *See supra* notes 171-75 and accompanying text (discussing *Danish Bottles*); notes 126-29 and accompanying text (discussing *Clover Leaf Creamery*).

187. *See Introduction of the Waste Export Control Act*, 135 Cong. Rec. E1949-03 (1989) (statement of Rep. John Conyers, Jr.) (discussing how the "tragedies of Love Canal and Times Beach brought home how devastating toxic contamination can be"); Julienne I. Adler, Comment, *United States' Waste Export Control Program: Burying Our Neighbors in Garbage*, 40 Am. U. L. Rev. 885, 885-87 & n.10 (1991) (describing several incidents where garbage barges floated around for months and then mysteriously lost their cargo); Frank Graham, Jr., *Earth Day: 25 Years*, Nat'l Geographic, Apr. 1995, at 122-24 (discussing the advent of Earth Day in response to a new awareness of severe environmental degradation).

188. Graham, *supra* note 187, at 124.

189. Senator D'Amato noted in 1988 that the United States "is on the brink of a waste management crisis" because "[m]ost people give little thought to what happens to their garbage when they bag it and put it out on the curbside for pickup." *Proceed-*

inform the people and protect our environment, our health, and our safety from all this garbage? Local government and the States are supposed to establish comprehensive waste management schemes that promote reduction, reuse, recycling, burning, and disposal in that order.[190] They can do this by setting goals for a maximum amount of waste production the state can handle safely, by creating a sense of responsibility for one's own consumption, and by reducing the movement of waste. Unfortunately, the Supreme Court disagrees. Although it generally favors environmental protection as a state goal, it has deemed that goal irrelevant in its free movement of waste cases, thwarting many state attempts at waste management.

A. *Environmental Cases Generally*

The Supreme Court recognizes conservation and environmental protection as not only legitimate, but compelling state interests.[191] Generally, if the Court believes that environmental protection is truly the state measure's primary purpose, it will uphold the measure against a Commerce Clause challenge. The Court looks particularly favorably on evenhanded environmental state measures, usually accepting the environmental purpose and at times not even going through the *Pike* balancing test before declaring the measure constitutional.[192]

In *Minnesota v. Clover Leaf Creamery Co.*[193] for example, the Court went out of its way to accept Minnesota's environmental purpose for prohibiting the use of nonreturnable plastic containers. Despite the state court's determination that the statute's purpose was to promote Minnesota's pulpwood industry at the expense of the completely out-of-state plastics industry,[194] the Supreme Court accepted the legislature's enunciated goal of promoting conservation and easing solid waste disposal problems and applied the *Pike* test. The Court found

ings and Debates on the Waste Export Control Act, 134 Cong. Rec. S13205-01 (1988) (statement of Senator Alfonse D'Amato).

190. Agenda for Action, *supra* note 18, at 16-17.

191. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 (1981) (noting the "substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems").

192. Geradin, *supra* note 31, at 158-59. Some lower federal courts and state courts have adopted this view and, instead of engaging in balancing, have simply determined if the measure is reasonable. *See, e.g.*, Procter & Gamble Co. v. City of Chicago, 509 F.2d 69, 76 (7th Cir.), *cert. denied*, 421 U.S. 978 (1975) (holding that where burden on interstate commerce is light and end is properly of local concern, any reasonable means will be constitutional); American Can Co. v. Oregon Liquor Control Comm'n, 517 P.2d 691, 697 (Or. Ct. App. 1973) (claiming inability to weigh environmental benefits against economic loss).

193. 449 U.S. 456 (1981).

194. *Id.* at 475.

the law valid even though it heavily burdened out-of-state industry while promoting in-state industry.[195]

The Court went even further in *Huron Portland Cement Co. v. City of Detroit*.[196] There the Court upheld a statute that limited the emissions of smoke within the city and harbor without applying any test: "The claim that the Detroit ordinance . . . imposes . . . an undue burden on interstate commerce needs no extended discussion. State regulation, based on the police power, [and] which does not discriminate against interstate commerce . . . , may constitutionally stand."[197] The court noted that the "ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power."[198] An evenhanded environmental statute then will almost certainly survive dormant Commerce Clause scrutiny.

Discriminatory statutes, however, are regarded with more suspicion than evenhanded statutes. Nonetheless, where the Court believes that a measure's true purpose is environmental protection, it carefully examines the evidence and gives deference to legislative choices. *Maine v. Taylor*[199] exemplifies this reasoning. The Court in *Taylor* rejected the indications of protectionist intent found by the Court of Appeals and the evidence presented in support of less discriminatory alternatives,[200] and deferred to the state's choice of means to protect its environment:

> "[T]he constitutional principles underlying the commerce clause cannot be read as requiring the State of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences."[201]

When a state does not needlessly obstruct trade or economically isolate itself, it retains "broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources."[202] Because the Commerce Clause "does not elevate free trade above all other values,"[203] the Court maintained the value of environmental protection by upholding a facially discriminatory statute.

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195. *Id.* at 473.
196. 362 U.S. 440 (1960).
197. *Id.* at 448.
198. *Id.* at 442.
199. 477 U.S. 131 (1986).
200. *Id.* at 148-51.
201. *Id.* at 148 (quoting United States v. Taylor, 585 F. Supp. 393, 397 (D. Me. 1984)).
202. *Id.* at 151.
203. *Id.*

In contrast, where the Court thinks the discriminatory measure's purpose is more economic than environmental, the Court easily discovers or simply presumes the existence of adequate alternatives. *Hughes v. Oklahoma*[204] exemplifies this reasoning. The *Hughes* Court doubted the conservational purpose of Oklahoma's ban on the export of minnows because the state did not restrict the catching or use of minnows in the state. The state chose "to 'conserve' its minnows in the way that most overtly discriminates against interstate commerce" and in a way that poorly served its purported purpose.[205] This evidence supported the view that the primary purpose was to protect the Oklahoma minnow market. The Court did not even suggest alternatives before holding the statute "repugnant to the Commerce Clause."[206]

The Court has protected state environmental goals at the expense of free trade in many instances. It has upheld both evenhanded and discriminatory measures against Commerce Clause challenges and has specifically noted that free trade is not a more important value than environmental protection.

When states have sincerely attempted to protect the environment by enacting measures that restrict the flow of waste across state lines, however, the Supreme Court has found the environmental interest irrelevant and struck down the measures based on a theory of arbitrary discrimination.

B. *The Free Movement of Waste Cases*

The Supreme Court first upheld local efforts to manage solid waste by controlling waste flow in 1905.[207] Today, through the seemingly endless expansion of federal power under the Commerce Clause,[208] Congress has begun to regulate the traditional state function of waste management.[209] But Congress has left the job unfinished and the

204. 441 U.S. 322 (1979).

205. *Id.* at 337-38. The Court noted that the late assertion of a conservation purpose gave that purpose "the flavor of a *post hoc* rationalization." *Id.* at 338 n.20.

206. *Id.* at 338; *cf.* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 354 (1977) (giving examples of less discriminatory but more effective alternatives based on common knowledge).

207. California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 325 (1905) (upholding San Francisco ordinance requiring all refuse generated within the city to be disposed of at specific, private facility); Gardner v. Michigan, 199 U.S. 325, 333 (1905) (upholding Detroit ordinance requiring all garbage to be collected and disposed of by a single operator).

208. *But see* United States v. Lopez, 115 S. Ct. 1624 (1995) (holding that federal regulation of guns near schools is not valid under the Commerce Clause and is thus an unconstitutional usurpation of state police power).

209. *See, e.g.*, RCRA, *supra* note 2 (regulating hazardous waste management); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9662 (1994) [hereinafter CERCLA] (regulating cleanup of damaged disposal sites).

states to pick up the slack. The states have tried to manage solid waste in various ways. States have, for example, tried to preserve landfill space by reducing or prohibiting the in-flow of waste from other states.[210] States have imposed higher dumping fees or higher taxes on out-of-state producers to discourage the in-flow of waste and to ensure that producers pay for the cost of managing their waste.[211] States have enacted efficient solid waste management schemes that require counties to landfill first their own waste and then any additional waste the county can manage.[212] States have allowed local governments to control the flow of waste to encourage self-sufficiency and ensure the financial viability of efficient waste management.[213] But the Supreme Court has invalidated each of these measures under the dormant Commerce Clause.

The Supreme Court first addressed interstate movement of waste in *City of Philadelphia v. New Jersey*.[214] New Jersey prohibited the importation of most solid and liquid waste in order to protect the environment and the health and safety of its citizens from the accumulation of waste in its overburdened landfills.[215] In light of earlier Supreme Court cases holding that some objects "are not legitimate subjects of trade and commerce"[216] because "on account of their existing condition, . . . [they] are . . . unfit for human use or consumption,"[217] the Court's first inquiry was whether the Commerce Clause even protected "valueless" waste. The Court found that these earlier "quarantine cases" did not remove a set of items from Commerce Clause protection, but rather identified items whose worth in interstate commerce was far outweighed by local safety concerns. Waste was thus an article of commerce deserving of Commerce Clause protection.[218]

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210. *See, e.g.*, Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 504 U.S. 353 (1992) (requiring authorization by county to dispose of out-of-county waste); Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992) (imposing additional fee for disposal of hazardous waste generated outside Alabama); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (banning the importation of most waste collected or originating outside New Jersey).

211. *See, e.g.*, Oregon Waste Systems, Inc. v. Department of Envtl. Quality, 114 S. Ct. 1345 (1994) (imposing additional fee for disposal of solid waste generated outside Oregon); *Chemical Waste*, 504 U.S. 334 (imposing additional fee for disposal of hazardous waste generated outside Alabama).

212. *See, e.g., Fort Gratiot*, 504 U.S. 353 (requiring county authorization to dispose of out-of-county waste in county landfills).

213. *See, e.g.*, C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677 (1994) (requiring all solid waste generated in town to be separated at a designated transfer station).

214. 437 U.S. 617 (1978).

215. *Id.* at 625. The text of the New Jersey statute sets out its purpose. *See supra* note 98 (quoting the text of the statute).

216. *Philadelphia*, 437 U.S. at 622 (quoting Bowman v. Chicago & N.W. Ry., 125 U.S. 465, 489 (1888)).

217. *Bowman*, 125 U.S. at 489.

218. *Philadelphia*, 437 U.S. at 622-23.

In response to arguments that waste creates the same kind of danger as the items prohibited from importation in the quarantine cases,[219] the Court distinguished those cases, stating:

> [T]hose quarantine laws banned the importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils. Those laws thus did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin.[220]

The Court admitted that New Jersey might be able to constitutionally prohibit waste importation under the quarantine precedents if "the very movement of waste into or through New Jersey endangers health, or . . . [if] waste must be disposed of as soon and as close to its point of generation as possible"[221] but noted that New Jersey had not asserted this.[222] Attempting then to distinguish solid waste from the "noxious articles" it had described, the Court declared that waste creates the harms to be prevented only after disposal, not when generated or moved.[223] New Jersey had thus arbitrarily discriminated against out-of-state waste by banning it, but not in-state waste, from its landfills.

The Court then created a virtually per se invalidity rule for discriminatory measures and struck down the New Jersey statute. According to its new rule, only if domestic waste could be distinguished from foreign waste or if waste fit into the Court's quarantine analysis could a statute restricting the flow of waste possibly withstand Commerce Clause scrutiny.[224] Ignoring over twenty years of precedent, the Court refused entirely to address the adequacy of less restrictive means to the legitimate end of environmental protection. New Jersey's "arbitrarily" discriminatory statute was per se invalid as economic protectionism regardless of legislative intent or an absence of adequate alternatives.

Although *Philadelphia* created a per se rule of invalidity for arbitrarily discriminatory state statutes, *Hughes v. Oklahoma*[225] later applied the general rule from *Dean Milk* to strike down a facially discriminatory statute without a legitimate basis for distinguishing in-state and out-of-state minnows.[226] *Maine v. Taylor*[227] upheld a facially discriminatory statute under the general rule but distinguished *Philadelphia* based on Maine's legitimate reason for distinguishing out-of-

219. *See supra* notes 216-18 and accompanying text.
220. *Philadelphia*, 437 U.S. at 628-29.
221. *Id.* at 629.
222. *Id.*
223. *Id.*
224. *See supra* note 97-105 and accompanying text.
225. 441 U.S. 322 (1979).
226. *See id.* at 336-38.
227. 477 U.S. 131 (1986).

state from native fish.[228] The next time the Court faced a state statute restricting interstate movement of waste was fourteen years after *Philadelphia* in both *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*[229] and *Chemical Waste Management, Inc. v. Hunt*.[230] In both cases, "states attempted to recast *Philadelphia* as not in tune with modern knowledge regarding the hazards of waste disposal and serious state efforts being made to plan for and dispose of waste."[231] The Court, however, rejected these arguments and applied *Philadelphia* without considering its flawed reasoning or the possibility that the measures in question should pass scrutiny even under the *Philadelphia* rubric.

Fort Gratiot concerned a provision in Michigan's Solid Waste Management Act ("SWMA"). The SWMA established a comprehensive waste management effort including local input and local responsibility such that each county planned for safe disposal of its own waste over the next twenty years. As part of that plan, Michigan enacted a provision prohibiting private landfill operators from accepting waste from outside the county unless explicitly authorized by the receiving county's waste management plan. When St. Clair County denied petitioner Fort Gratiot Sanitary Landfill this authority, the provision effectively prohibited the importation of waste into the county and led to a dormant Commerce Clause challenge.[232] The Court's first substantive statement was "*Philadelphia v. New Jersey* provides the framework for our analysis of this case."[233] Although the Court mentioned the *Dean Milk* "no adequate alternatives" test,[234] it refused to apply the test because Michigan had not argued that it could prove the absence of adequate alternatives.[235] The Court stated the standard it would apply as follows: "A state statute that clearly discriminates against interstate commerce is . . . unconstitutional 'unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.'"[236]

Michigan first argued that its provision applied evenhandedly to in-state and out-of-state waste by banning both from importation into the county. The Court rejected this argument because a "State . . .

228. *Id.* at 150-52.
229. 504 U.S. 353 (1992).
230. 504 U.S. 334 (1992).
231. Stanley E. Cox, *What May States Do About Out-of-State Waste in Light of Recent Supreme Court Decisions Applying the Dormant Commerce Clause? Kentucky as Case Study in the Waste Wars*, 83 Ky. L.J. 551, 571 (1994).
232. *Fort Gratiot*, 504 U.S. at 355-57.
233. *Id.* at 359.
234. *Id.* at 366 ("Because those provisions unambiguously discriminate against interstate commerce, the State bears the burden of proving that they further health and safety concerns that cannot be adequately served by nondiscriminatory alternatives.").
235. *See id.* at 366 n.8.
236. *Id.* at 359 (quoting New Energy Co. v. Limbach, 486 U.S. 269, 274 (1988)).

may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself."[237] The measure was therefore discriminatory. Michigan then argued to no avail that the SWMA constituted a comprehensive health and safety regulation rather than economic protectionism and that the restrictions were necessary to provide safe, efficient disposal. The Court held that absent any showing that the imported waste "raised health or other concerns not presented by Michigan waste,"[238] the measure was appropriately characterized as protectionist and thus could not withstand Commerce Clause scrutiny.[239] *Philadelphia* "control[led] the disposition of this case."[240]

Chemical Waste presented a similar problem. In response to a large increase in the volume of hazardous waste entering Alabama, Alabama capped the amount of and imposed a disposal fee on all hazardous waste disposed of at its facilities. Alabama also imposed an additional disposal fee for all hazardous waste generated outside of Alabama.[241] Only the discriminatory fee was at issue before the Supreme Court. The State argued that the additional fee served several purposes: (1) protection of health and safety; (2) conservation of the environment; (3) compensation for the burdens imposed by out-of-state generators dumping in Alabama; and (4) reduction of risks created by the flow of waste on the state's highways.[242] Although the Court cited the *Dean Milk* general rule and suggested some alternatives, *Philadelphia* once again controlled the outcome because the Court found in-state and out-of-state waste indistinguishable:[243]

> To the extent Alabama's concern touches environmental conservation and the health and safety of its citizens, such concern does not vary with the point of origin of the waste .... Even with the possible future . . . environmental risks to be borne by Alabama, such risks likewise do not vary with the waste's State of origin in a way allowing foreign, but not local, waste to be burdened.[244]

The Court also found the quarantine cases inapplicable for the same reasons it stated in *Philadelphia*.[245]

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237. *Id.* at 361.
238. *Id.* at 367.
239. *Id.* at 367-68.
240. *Id.* at 361.
241. Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334, 338-39 (1992). The Alabama Supreme Court found all three provisions constitutional, holding in particular that the additional fee advanced legitimate local purposes that could not be adequately served by nondiscriminatory alternatives. The Supreme Court granted certiori limited to the challenge of the discriminatory fee. *Id.* at 339.
242. *Id.* at 343.
243. *Id.* at 342, 344-46.
244. *Id.* at 345-46.
245. *Id.* at 346-47.

The Court again addressed the free movement of waste only two years later in *Oregon Waste Systems, Inc. v. Department of Environmental Quality*[246] and *C & A Carbone, Inc. v. Town of Clarkstown.*[247] *Oregon Waste* presented the same issue as *Chemical Waste*, a discriminatory waste disposal fee. Oregon imposed a $2.25 per ton surcharge on in-state disposal of waste generated outside Oregon and only a $0.85 per ton disposal fee on waste generated in Oregon.[248] The measure was facially discriminatory and therefore subject to the "virtually *per se* rule of invalidity."[249] At this point, the Court seemed to merge the per se invalidity test from *Philadelphia* with the "no adequate alternatives" test from *Dean Milk*:

> Because the Oregon surcharge is discriminatory, the virtually *per se* rule of invalidity provides the proper legal standard here, not the *Pike* balancing test. As a result, the surcharge must be invalidated unless respondents can "sho[w] that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[250]

The Court, however, did not discuss legitimate purposes or adequate alternatives but rather "legitimate reasons to subject waste from other States to a higher charge than is levied against waste from Oregon."[251] This simply employs the *Philadelphia* means analysis dependent on distinguishing in-state and out-of-state goods. In making its analysis, the Court noted that the State failed to raise any health or safety reasons to reduce the flow of waste into Oregon that were properly based on the unique nature of out-of-state waste. It also found all other proffered reasons for treating out-of-state waste differently than in-state waste illegitimate.[252] The discriminatory fee was held "facially invalid under the negative Commerce Clause."[253]

Carbone buried all hopes of effective waste management or waste reduction. In an effort to efficiently manage its own waste, Clarkstown, New York created a plan to finance a state-of-the-art waste transfer station by guaranteeing a minimum waste flow and allowing the contractor to charge a per-ton tipping fee. To meet that guaran-

246. 114 S. Ct. 1345 (1994).
247. 114 S. Ct. 1677 (1994).
248. *Oregon Waste*, 114 S. Ct. at 1348.
249. *Id.* at 1351.
250. *Id.* (quoting New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988)).
251. *Id.*
252. *Id.* at 1351, 1355. One proffered reason was cost differential. Oregonians paid state taxes partially to pay for waste disposal. Producers from out of state did not pay the tax and thus could make up the difference by paying a surcharge. The Court found that Oregon's system was not a compensatory tax nor a legitimate cost spreading scheme. *Id.* at 1353-54. Another reason was protection of natural resources. The Court ruled that a State may not afford its own citizens a preferred right of access to its natural resources. *Id.* at 1354 (citing City of Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978)).
253. *Id.* at 1355.

tee, the town passed a flow control ordinance requiring all solid waste in the town (generated inside or outside of the town) to be processed at the designated transfer station before leaving the municipality.[254] Although the measure was facially neutral as it applied to all waste haulers, the Court found a discriminatory impact on interstate commerce. It reasoned that compelling everyone who sent their waste into Clarkstown to pay the extra tipping fee drove up the cost for out-of-state producers to dispose of their solid waste and deprived other processors of access to the local market.[255] The article of commerce was "not so much the solid waste itself, but rather the service of processing and disposing of it"[256] and the town had "bar[red] the import of the processing service."[257]

Having found the ordinance discriminatory in effect, the Court noted that the "central rationale for the rule against discrimination is to prohibit state or municipal laws whose *object* is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."[258] In laying out the standard for discriminatory legislation, the Court again merged the per se test with the *Dean Milk* general rule: "Discrimination against interstate commerce in favor of local business or investment is per se invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest."[259] This time, however, it actually followed the *Dean Milk* analysis. The Court addressed a "number of *amici*" arguing that depleted landfill space and increasing cleanup costs make flow control "necessary to ensure the safe handling and proper treatment of solid waste"[260] but rejected the arguments because Clarkstown had "any number of nondiscriminatory alternatives for addressing the health and environmental problems alleged to justify the ordinance."[261] The financing purpose was not even considered legitimate.[262] The ordinance was therefore unconstitutional.[263] Although the Court gave only a cursory analysis under the "no adequate alternative" test, applying it at all was a step in the right direction.

254. C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677, 1680 (1994).
255. *Id.* at 1681-82.
256. *Id.* at 1682.
257. *Id.* at 1683. As the Court amusingly put it, the town "hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility." *Id.*
258. *Id.* at 1682 (emphasis added). *Philadelphia* clearly does not include an analysis of "the object" of a law as the ends were there deemed irrelevant. City of Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978).
259. *Carbone*, 114 S. Ct. at 1683.
260. *Id.*
261. *Id.*
262. *Id.* at 1684.
263. *Id.*

Justice O'Connor, in a concurring opinion, invalidated the ordinance for a different reason. In her view, the ordinance was even-handed but imposed "an excessive burden on interstate commerce."[264] The ordinance did not discriminate in any way on the basis of origin but rather achieved a monopoly at the expense of all competitors.[265] The measure nevertheless violated the Commerce Clause because squelching competition in the waste processing service altogether imposed a burden on interstate commerce clearly excessive in relation to Clarkstown's legitimate aim of financing proper waste disposal.[266]

The Supreme Court has reviewed five measures aimed at protecting the environment by restricting the flow of waste across state lines, four of which include state waste management schemes that implement point source management and self-sufficiency principles.[267] These principles are part of a voiced, but not enacted, national environmental protection policy. Congress has found that "[c]ontinued exports of solid waste serve as a disincentive to implementation of existing domestic policy, which recognizes waste reduction and recycling as the best methods of solid waste management."[268] The United States has signed and attempted to implement the Basel Convention, an international treaty that restricts transfrontier movement of hazardous waste,[269] but has so far failed to enact the implementing legislation required to become a member.[270] Although the states have attempted to manage the nation's waste disposal crisis in a manner consistent with national environmental protection policy, because Congress has not enacted legislation clearly giving states the authority to restrict the flow of waste, the Supreme Court has invalidated each state measure.

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264. *Id.* at 1687 (O'Connor, J., concurring).

265. *Id.* at 1689.

266. *Id.* at 1690-91.

267. For a description of point source management and self-sufficiency principles, see *infra* part III.A.

268. H.R. 2580, 102d Cong., 1st Sess. (1991); *see also* H.R. 3706, 103d Cong., 1st Sess. (1993) (stating the same finding).

269. *See supra* note 26 (explaining the Basel Convention's goals and means of achieving them).

270. *See* Rod Hunter, *A Hazardous Proposal for Waste*, Wall St. J. Eur., Sept. 19, 1995, at 8 (noting that although the European Union is a party, the United States is not a party because it has yet to ratify the Basel Convention). Congress has made several attempts to implement the Basel Convention but has failed each time. *See, e.g.*, H.R. 3965, 103d Cong., 2d Sess. (1994) (proposing a Bill to amend the Solid Waste Disposal Act to implement the Basel Convention); H.R. 3706, 103d Cong., 1st Sess. (1993) (proposing a Bill to prohibit the international export and import of certain solid waste); H.R. 2580, 102d Cong., 1st Sess. (1991) (same); S. 1082, 102d Cong., 1st Sess. (1991) (proposing a Bill to amend the Solid Waste Disposal Act to restrict and monitor the import and export of waste and implement the Basel Convention).

III. THE EUROPEAN COURT OF JUSTICE PROTECTS THE ENVIRONMENT FROM THE FREE MOVEMENT OF WASTE

Unlike the Supreme Court, the European Court of Justice has incorporated Community environmental protection policies and modern views on the nature of waste and the exigencies of proper waste disposal into its free movement of goods jurisprudence. Because the European Union must deal with the mounting problem of waste disposal,[271] the Member States included in the EC Treaty a section on the environment.[272] Under these and other treaty provisions, the Community has enacted several regulations and directives and issued several policy statements concerning waste management and disposal.[273] The Community, however, has been unable to control the problem due to its own sluggish methods[274] and due to certain provisions in the EC Treaty allowing Member States to derogate from this legislation for purposes of protecting the environment.[275] Articles

271. Williams, *supra* note 60, at 143 (noting that in 1986, more than 55% of the EC population considered the problem of environmental protection to be "immediate and urgent"); *Waste/Environment Policy: European Union Lacking Ideas According to Mr. De Sadeleer*, Eur. Env't, 1996 WL 8758948, Jan. 23, 1996, at *4 [hereinafter *Lacking Ideas*] ("Production of waste [in the EU] continues to grow.").

272. EC Treaty tit. XVI. Title XVI on Environment contains three Articles: Article 130r setting forth objectives and methods of attainment; Article 130s setting out a procedure for the adoption of Community environmental legislation; and Article 130t reserving to the Member States the power to introduce more stringent measures compatible with the Treaty.

273. *See, e.g.*, Parliament and Council Directive 94/62 on Packaging and Packaging Waste, 1994 O.J. (L 365) 10; Council Regulation 259/93 EEC on the Supervision and Control of Shipments of Waste Within, Into and Out of the European Community, 1993 O.J. (L 30) 1; Council Resolution on Waste Policy, 1990 O.J. (C 122) 2; Council Directive 91/156 EEC amending Directive 75/442 EEC on Waste, 1991 O.J. (L 78) 32; Council Directive 91/689 EEC on Hazardous Waste, 1991 O.J. (L 377) 20.

274. *See Lacking Ideas*, *supra* note 271, at *2. Nicolas de Sadeleer, one of the leading specialists on European environment law, commented:

> Community legislation governing waste has played an important role in the rapid development of national and regional regulations in Western Europe over the last twenty years.... By obliging the Member States to adopt rules on the management, recovery and disposal of all types of waste ... Community law played a pioneering role.
>
> ....
>
> Since then, the influence exerted by the European Community appears to be showing the first signs of running out of steam ....
>
> ....
>
> ... When faced with real problems, the Member States will then have to make do without Community-scale harmonization—too slow, too complex—and intervene directly themselves even if it means provoking distortions in the market.

Id. at *2-3.

275. EC Treaty arts. 100a(4), 130t. Article 100a(4) allows the Member States to derogate from measures enacted under Article 100a(1) on the internal market:

> If, after the adoption of a harmonization measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36, or relating to

100a(4) and 130t allow Member States to enact measures to protect the environment but only to the extent compatible with the EC Treaty.[276] Articles 30 and 34, therefore, still limit the Member States' ability to enact environmental protection measures that restrict the free movement of goods. The ECJ interprets those limits and has found that environmental protection in the form of point source management and self-sufficiency is an imperative state interest that must be carefully balanced against the values of free trade and market unity.

A. *The European Union Environmental Policies of Proximity and Self-Sufficiency*

EC Treaty Article 130r(1) sets out the objectives to be pursued through the Community's environmental policy:

> —preserving, protecting and improving the quality of the environment;
> —protecting human health;
> —prudent and rational utilization of natural resources;
> —promoting measures at international level to deal with regional or worldwide environmental problems.[277]

Article 130r(2) describes that policy: "Community policy on the environment shall aim at a high level of protection . . . . It shall be based on the precautionary principle and on the principles that preventative action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."[278] Based on these provisions, the Community has adopted two major principles—the "proximity principle" and the "self sufficiency principle"—

> protection of the environment . . ., it shall notify the Commission of these provisions.
>
> The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.

EC Treaty art. 100a(4). Article 130t allows the Member States to derogate from measures enacted under Article 130s on protection of the environment: "The protective measures adopted pursuant to Article 130s shall not prevent any Member States from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty." EC Treaty art. 130t. It should be noted, however, that both derogation provisions confine those derogations to measures compatible with the Treaty and thus more specifically with Article 30's and Article 34's limits on restricting the free movement of goods.

Another consequence of these provisions is that the EC has not been able to preempt Member State legislation in the area of non-hazardous waste. *See supra* note 30.

276. EC Treaty arts. 100a(4), 130t.

277. EC Treaty art. 130r(1).

278. EC Treaty art. 130r(2). For a general discussion of the Community's environmental policy, see Dr. Ludwig Kramer, E.C. Treaty and Environmental Law 45-70 (1995). For a discussion of the Community's Environmental Action Programmes, see Stanley P. Johnson & Guy Corcelle, The Environmental Policy of the European Communities 11-21 (1989).

aimed at protecting the environment through waste reduction and point source management.[279]

The proximity principle, or point source management, is a fundamental part of the Community's waste management policy.[280] It requires that waste be disposed of by the safest means available and as close to its source as possible.[281] This approach minimizes the transport of dangerous material, reduces waste generation by creating awareness of disposal problems and encouraging responsibility at the local level, leads to efficient waste management plans by limiting the space available for disposal, and prevents the large imbalances in environmental risk that arise when waste may be sent to the cheapest land for disposal.[282]

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279. The proximity and self-sufficiency principles first appeared in the Community's 3rd Environmental Action Programme (1982-1986) and then in the 4th Environmental Action Programme (1987-92). *See* Johnson & Corcelle, *supra* note 278, at 17-19.

280. EC Treaty art 130r(2) ("[E]nvironmental damage should . . . be rectified at source . . . ."); Common Position 4/96 on Landfill of Waste, 1996 O.J. (C 59) 1, 1 ("Member States should be able to apply the principles of proximity and self-sufficiency for the elimination of their waste at Community and national levels."); Council Regulation 259/93 EEC on Shipments of Waste, pmbl., 1993 O.J. (L 30) 1, 2 ("Member States should be able to implement the principles of proximity, priority for recovery and self-sufficiency . . . by taking measures . . . to prohibit generally or partially or to object systematically to shipments of waste for disposal . . . ."); Council Directive 91/156 EEC on Waste, pmbl., 1991 O.J. (L 78) 32, 32 ("[M]ovements of waste should be reduced and . . . Member States may take the necessary measures to that end in their management plans."), art. 5(2), 1991 O.J. (L 78) 32, 34 ("The network must also enable waste to be disposed of in one of the nearest appropriate installations . . . in order to ensure a high level of protection for the environment and public health."); Council Resolution on Waste Policy, pmbl., 1990 O.J. (C 122) 2, 2 ("[I]n the interest of environmental protection, ... production of waste should . . . be prevented or reduced at source . . . [and] movements of waste should be reduced to the minimum necessary for environmentally safe disposal . . . .").

281. EC Treaty art. 130r(2) ("[E]nvironmental damage should . . . be rectified at source . . . ."); Council Resolution on Waste Policy, pmbl., 1990 O.J. (C 122) 2, 2 ("[I]n the interest of environmental protection, ... production of waste should . . . be prevented or reduced at source . . . [and] movements of waste should be reduced to the minimum necessary for environmentally safe disposal . . . ."); Council Directive 91/156 EEC on Waste, pmbl., 1991 O.J. (L 78) 32, 32 ("[M]ovements of waste should be reduced and . . . Member States may take the necessary measures to that end in their management plans."), art. 5(2), 1991 O.J. (L 78) 32, 34 ("The network must also enable waste to be disposed of in one of the nearest appropriate installations . . . in order to ensure a high level of protection for the environment and public health."); Basel Convention, Mar. 22, 1989, art. 4(2)(b, d) (demanding waste management occur in the country of its source and transboundary movement of waste be reduced); *see also* Jennifer R. Kitt, Note, *Waste Exports to the Developing World: A Global Response*, 7 Geo. Int'l Envtl. L. Rev. 485, 495 (1995) (describing the objectives encompassed within the proximity principle); Andrew Evans Skroback, Note, *Even a Sacred Cow Must Live in a Green Pasture: The Proximity Principle, Free Movement of Goods, and Regulation 259/93 on Transfrontier Waste Shipments Within the EC*, 17 B.C. Int'l & Comp. L. Rev. 85, 87 (1994) (analyzing the purposes of the proximity principle and describing the principle as "fundamental").

282. *See* Skroback, *supra* note 281, at 91 (arguing that implementation of the proximity principle with forestall further imbalance in waste disposal and decrease the

The self-sufficiency principle is also extremely important to the Community's waste management goals.[283] Self-sufficiency aims at reducing or eliminating waste exports in an effort to force responsibility for waste disposal on those who generate it.[284] Its goals overlap with the proximity goals. Final waste disposal in the country of generation limits available disposal space, balances environmental risks, and most importantly, creates a sense of responsibility. Responsibility in turn produces responsible action. When people know that their waste will be "dumped in their backyard," it suddenly becomes more important to reduce, recycle, reuse, and implement *very* efficient waste disposal systems.

The proximity and self-sufficiency principles guide the Member States' and the Community's waste management policies at the national, Community, and international levels.[285] As the European Union's Environment Commissioner, Ritt Bjerreggard, has stated, "We cannot continue to think we can deal with our waste problems by exporting them."[286] At the national and Community levels, the Community and its members worry that "the abolition of all internal frontiers will greatly weaken controls on waste management, thus increasing the chances of exportation from higher producing States to the cheapest, and probably least safe disposers. As production of waste grows, so grow concerns of 'waste tourism' across Europe."[287] They have thus implemented the proximity and self-sufficiency princi-

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hazards of long-distance waste hauling); *see also Council: EEC Hold-Up on Movement of Waste*, Eur. Info. Serv., Europe Energy, 1992 WL 2735707, *1 (Apr. 3, 1992) (quoting French Prime Minister Brice Lalonde's comment, "We do not want to become a rubbish dump for the Community.").

283. *See* Common Position 4/96, 1996 O.J. (C 59) 1, 1 ("Member States should be able to apply the principles of proximity and self-sufficiency for the elimination of their waste at Community and national levels."); Council Regulation 259/93 EEC on Shipments of Waste, 1993 O.J. (L 30) 1, 2 ("Member States should be able to implement the principles of proximity, priority for recovery and self-sufficiency . . . by taking measures . . . to prohibit generally or partially or to object systematically to shipments of waste for disposal . . . ."); Council Directive 91/156 EEC on Waste, pmbl., 1991 O.J. (L 78) 32, 32 ("[I]t is desirable for Member States individually to aim at . . . self-sufficiency . . . .").

284. *See* Kitt, *supra* note 281, at 495; Skroback, *supra* note 281, at 87.

285. *See* Kurt M. Rozelsky, *European Economic Communities—Environmental Policy—Legal Basis and International Implications of Council Regulation on the Supervision and Control of Shipments of Hazardous Waste*, 23 Ga. J. Int'l & Comp. L. 111, 139 (1993). Mr. Rozelsky noted:

> By requiring notification and consent upon shipments of waste, the Waste Shipment Regulation safeguards intra-Community shipments to ensure proper disposal of waste as near the source as possible, while allowing for the economic disparities of the smaller states. In the international arena, the Community has initiated a new era of environmental policy that should provide a successful model for the coexistence of intra-Community and extra-Community environmental protection.

Id.

286. Hunter, *supra* note 270, at 8.

287. Rozelsky, *supra* note 285, at 125.

ples within the Community. At the international level, the Community has implemented the Basel Convention on the movement of hazardous wastes and their disposal, which also adopts point source management and self-sufficiency as two of the cornerstones of its environmental/trade policy.[288] The Basel Convention today includes ninety-eight nations.[289] The United States has signed the Convention but has not yet enacted the implementing legislation required to become a member.[290] Apparently much of the global community believes these policies will work to protect the local and global environment.

B. *Environmental Protection Is an Imperative State Interest*

The European Court of Justice first recognized environmental protection as an essential objective capable of limiting the principle of free trade in *Procureur de la République v. Association de Défence des Brûleurs d'huiles Usagées (Waste Oils)*.[291] The Court of Justice considered not a Member State measure but rather a Community measure that restricted the free movement of goods. The court maintained:

> [T]he principle of freedom of trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of general interest pursued by the Community provided that the rights in question are not substantively impaired.

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288. Council Decision 93/98 EEC on the Conclusion, on Behalf of the Community, of the Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal (Basel Convention), pmbl. & art. 1, 1993 O.J. (L 39) 1, 1 (stating that the Council adopted Regulation 259/93 EEC to "make the existing Community system . . . comply with the requirements of the Basel Convention" and approving the Convention on behalf of the Community). The Basel Convention preamble states that the parties are

> [m]indful of the growing threat to human health and the environment posed by the increased generation . . . and the transboundary movement of hazardous wastes and other wastes, . . . [and] [c]onvinced that hazardous wastes and other wastes should, as far as is compatible with environmentally sound and efficient management, be disposed of in the State where they were generated . . . .

Council Decision 93/98 EEC, annex, 1993 O.J. (L 39) 3, 3.

289. Cohen, *supra* note 26, at 51.

290. *See id.* (noting the United States is a notable exception to the Basel Convention's list of contracting parties); Hunter, *supra* note 270, at 8 (noting that the European Union is a party but the United States is not as it has yet to ratify the Basel Convention). Congress has made several attempts to implement the Basel Convention but has failed each time. *See, e.g.*, H.R. 3965, 103d Cong., 2d Sess. (1994) (proposing a Bill to amend the Solid Waste Disposal Act to implement the Basel Convention); H.R. 3706, 103d Cong., 1st Sess. (1993) (proposing a Bill to prohibit the international export and import of certain solid waste); H.R. 2580, 102d Cong., 1st Sess. (1991) (same); S. 1082, 102d Cong., 1st Sess. (1991) (proposing a Bill to amend the Solid Waste Disposal Act to restrict and monitor the import and export of waste and implement the Basel Convention).

291. Case 240/83, 1985 E.C.R. 531, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,164 (1985).

> There is no reason to conclude that the directive has exceeded those limits. The directive must be seen in the perspective of environmental protection, which is one of the Community's essential objectives.[292]

The Court of Justice confirmed that environmental protection is also an imperative state interest in *Commission v. Denmark (Danish Bottles)*[293] where it upheld a Member State environmental protection measure under the rule of reason.[294] The court held that "protection of the environment is 'one of the Community's essential objectives,' which may as such justify certain limitations of the principle of the free movement of goods. . . . [P]rotection of the environment is a mandatory requirement which may limit the application of Article 30 of the Treaty."[295]

C. *Recognizing the Means Necessary to the Objective of Environmental Protection*

Danish Bottles represents the European Court of Justice's first analysis of a Member State environmental measure under the rule of reason. Without discussing the issue of discrimination, the Court of Justice found a Danish law requiring that all beer and soda be sold in returnable bottles necessary to achieving a workable deposit-and-return system. In doing so, the court accepted a high level of environmental protection as an imperative state interest and upheld the means necessary to achieving that interest. The Court of Justice in turn struck down the portion of the law requiring the containers be approved by a government agency as disproportional to the general interest of environmental protection.[296]

The second environmental protection case to come before the Court of Justice was *Commission v. Belgium (Walloon Waste)*.[297] In *Walloon Waste*, the court considered for the first time restrictions on the movement of waste in intracommunity commerce. The Belgian region of Wallonia effectively prohibited all waste generated outside Wallonia from being stored, dumped, or tipped in Wallonia for the expressed purpose of protecting the environment by preventing waste from accumulating, encouraging recycling and recovery, and organizing local waste disposal.[298] The Commission argued that the decree undermined Council Directive 75/442 on waste and Council Directive 84/361 on the transfrontier shipment of hazardous waste and violated

292. *Waste Oils*, 1985 E.C.R. at 549.
293. Case 302/86, 1988 E.C.R. 4607, [1989] 1 C.M.L.R. 619 (1988).
294. *Danish Bottles*, 1988 E.C.R. at 4630. The rule of reason is explained in part II.C.2.b.
295. *Id.* (citing *Waste Oils*, 1985 E.C.R. at 549).
296. *See supra* text accompanying notes 171-75.
297. Case C-2/90, 1992 E.C.R. I-4431, [1993] 1 C.M.L.R. 365 (1992).
298. *Walloon Waste*, 1992 E.C.R. at I-4433 to I-4434.

Article 30 of the EEC (now EC) Treaty.[299] The Court of Justice found that the directive on the movement of hazardous waste set up a complete system and thus precluded a complete ban on hazardous waste.[300] The Directive on waste, however, contained only general provisions concerning waste disposal and thus did not prevent Member States from banning "non-hazardous" waste.[301] The final question then was whether banning non-hazardous waste violated Article 30.

As the Supreme Court did in *Philadelphia*, the European Court of Justice first determined that nonreuseable waste could be considered a "good" under Article 30:

> [O]bjects which are shipped across a frontier for the purpose of commercial transactions are subject to Article 30, whatever the nature of those transactions. . . . It must therefore be concluded that waste, whether recyclable or not, is to be regarded as 'goods' the movement of which, in accordance with Article 30 of the Treaty, must in principle not be prevented.[302]

The court then went on to address Wallonia's import ban. Belgium set out an argument under the rule of reason, contending that its temporary measure guarding against the dangerous influx of waste from neighboring countries and regions was justified on the grounds of its imperative interest in environmental protection and human health.[303] Although Advocate General Jacobs had found the decree facially discriminatory and thus not entitled to analysis under the rule of reason,[304] the Court of Justice held that the decree was not discriminatory because of the "differences between waste produced in different places and . . . the connection of the waste with its place of production."[305] The proximity and self-sufficiency principles supported the Court of Justice's reasoning because under those principles, Member States were required to manage and dispose of their own waste. This made out-of-state waste cumulative and therefore dangerous.[306]

The Court of Justice then agreed with Belgium that a prohibition against disposal of waste from outside Wallonia was justified under the rule of reason by interests "relating to environmental protection."[307] The court reasoned:

> [W]aste is matter of special kind. Accumulation of waste, even before it becomes a health hazard, constitutes a danger to the environment, regard being had in particular to the limited capacity of each region or locality for waste reception. . . . [Because of] the

299. *Id.* at I-4437.
300. *Id.* at I-4477.
301. *Id.*
302. *Id.* at I-4478 to I-4479.
303. *Id.* at I-4478.
304. *Id.* at I-4467 (opinion of Advocate General Francis Jacobs).
305. *Id.* at I-4480.
306. *Id.* at I-4479.
307. *Id.*

> abnormal large scale inflow of waste from other regions for the tipping in Wallonia, there was a real danger the environment, having regard to the limited capacity of that region.[308]

The Court of Justice considered that the serious environmental threats inherent in the accumulation of waste justified a significant restriction on trade. The proximity and self-sufficiency principles encouraged the reduction in waste flow and self-responsibility of Wallonia's decree. In addition, the decree was temporary. These factors indicated to the court that Wallonia was employing the means necessary to protect the environment. The court therefore upheld the import ban.[309]

The Court of Justice's ultimate conclusion and some of its statements comport with a heightened awareness of environmental concerns, of the unique nature of waste, and of the means necessary to fulfilling the proximity and self-sufficiency principles and thus protecting the environment. The court's analysis, however, should be criticized for its cursory, presumptive nature. The Court of Justice did not clearly perform the proportionality test nor support its conclusions with sufficient evidence. Nonetheless, it properly recognized that Member States were taking responsibility for their own waste, making out-of-state waste more dangerous due to its cumulative effect, and also properly noted that Wallonia was implementing and promoting the proximity and self-sufficiency principles adopted as the best and necessary means of protecting the environment in the Community and the world. Thus, in the end, the Court of Justice made the right decision.

IV. Appropriate and Necessary Measures To Save the Earth and Its Inhabitants

The several states of the United States are in a catch-22 situation. While they are encouraged to implement comprehensive waste management schemes and to take responsibility for their own waste generation, they are also told that they cannot place any restrictions on the free flow of waste in the process. States that attempt to efficiently reduce and manage waste are crippled by the Supreme Court's dormant Commerce Clause jurisprudence. As Chief Justice Rehnquist stated in *Oregon Waste*:

> While [the Court] once recognized that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies," the Court today leaves States with only two options: become a dumper and ship as much waste as possible to a less populated State, or become a dumpee, and stoically accept waste from more densely populated States.[310]

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308. *Id.*

309. *Id.* at I-4481.

310. Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 114 S. Ct. 1345, 1357 (1994) (Rehnquist, C.J., dissenting) (quoting 42 U.S.C. § 6901(a)(4) (1976)).

This does nothing to improve the environment or the disposal process but instead exacerbates an already desperate problem.

In light of current knowledge about the risks of transport and permanent disposal of solid waste and about the best ways to reduce generation of and efficiently manage waste, the Supreme Court must alter its approach to state environmental protection measures. If the European Court of Justice, which must operate in a federal system under a constitution that *expressly protects* the free movement of goods, understands the nature of waste and the means necessary to protect the environment to require a complete ban of out-of-state waste, so should the Supreme Court. Applying the proper *Dean Milk* test and the same rationale as the Court of Justice, the Supreme Court would uphold the measures it has heretofore struck down. Even under the *Philadelphia* test, the Court of Justice's rationale regarding the differences between in-state and out-of-state waste and the proximity principle would lead the Supreme Court to uphold those same measures. It is time the Court learned a lesson from the European Court of Justice.

A. *The Failure of the Court*

Although the Court has been amenable to evenhanded environmental laws and has given a full and fair analysis to discriminatory environmental laws that do not effect the movement of waste, it has systematically struck down any measure that restricts the free flow of waste. It does not closely examine the evidence, nor defer to legislative decisions when the scientific evidence or judicial knowledge is insufficient to determine what is adequate to protect the environment.[311] Instead, it stubbornly persists to find "economic protectionism" and "arbitrary discrimination" behind every state measure in order to condemn it as per se invalid.[312]

1. Dumping *Philadelphia*

The Supreme Court's first mistake was to create an inappropriate test for determining the limits imposed by the Commerce Clause on a state's power to restrict interstate trade for a legitimate purpose.[313] The *Philadelphia* Court simply applied poor reasoning. Abandoning

311. The Court in Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 470 (1981), stated that "it is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature." The Court has not followed this command.

312. In Maine v. Taylor, 477 U.S. 131, 148 (1986), and *Clover Leaf Creamery*, 449 U.S. at 473, the Court specifically rejected the lower courts' determinations that the measure in question was really economic protectionism instead of environmental protectionism. The Court, however, refuses to accept environmental protection as the true purpose of state restrictions of the movement of waste.

313. *See generally* Stanley E. Cox, *Burying Misconceptions About Trash and Commerce: Why It Is Time to Dump* Philadelphia v. New Jersey, 20 Cap. U. L. Rev. 813

twenty years of precedent that had appropriately implemented the already stringent "no adequate alternatives" test for discriminatory state measures, it chose to disregard both the states' legislative purposes and the possible existence of less discriminatory means in favor of a "virtually per se rule of invalidity."[314] Unlike this analysis-barren test, the *Dean Milk* "no adequate alternatives" approach[315] properly focuses on the two factors most relevant to analyzing protectionism, the ends and the means. It also recognizes those situations where discrimination is the only adequate alternative for accomplishing a legitimate goal. Invalidating a law solely because it employs discriminatory means does not fulfill the primary purpose of the dormant Commerce Clause, which is to prohibit economic protectionism while allowing states to take reasonable measures to protect the health, safety and environment of its citizens.

Not only did the Court apply the wrong test, it failed to recognize the realities of waste management. *Philadelphia* laid out an analysis that included two ways of avoiding per se invalidity: (1) differentiate between the harm caused by the in-state and out-of-state item; or (2) identify the item as a proper subject of the Court's quarantine analysis.[316] The Court dismissed the idea that out-of-state waste could be more harmful than in-state waste by asserting that the harm created by waste "arise[s] after its disposal in landfill sites."[317] Because states manage their own waste, however, out-of-state waste creates an additional burden. The extra accumulation of waste is dangerous to the environment, human health, and human safety, making out-of-state waste not inherently more dangerous, but rather circumstantially more dangerous. The Court also dismissed the idea "that the very movement of waste into or through New Jersey endangers health, or that waste must be disposed of as soon and as close to its point of generation as possible."[318] Ironically, the Court here unknowingly described the proximity principle which pervades the international, European Union, and United States policies on environmental protection.[319] This principle embraces the notion that the nature of waste is such that its very movement does endanger health and lead to less efficient and less effective waste management, thereby endangering the whole planet. The principle also incorporates the idea that

(1991) (arguing that the Commerce Clause should not compel one state to shoulder the burden of another state's waste).

314. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

315. *See supra* part I.C.1.a.

316. *See supra* note 104-05 and accompanying text.

317. *Philadelphia*, 437 U.S. at 629.

318. *Id.*

319. *See supra* notes 268-70 and accompanying text (noting congressional findings and Executive actions that indicated U.S. adoption of the proximity and self-sufficiency principles); part III.A (discussing the European Community's proximity and self-sufficiency principles).

waste should be disposed of as soon and as close to its point of generation as possible because this is the best way to safely manage waste and thus protect the environment. Although the Supreme Court does not seem to agree, waste is a noxious item both on the road and in a landfill. Disposing of waste as close as possible to its source prevents the dangers of moving it and also reduces waste production and unsafe disposal by creating awareness of and responsibility for one's own consumption. Nothing short of limiting the amount of waste that may come in or out of a locality will adequately serve these goals. This high level of environmental protection is what the United States needs. Had the Court understood the true nature of waste and waste management and recognized the proper methods of preventing environmental degradation, it would have upheld New Jersey's ban even under its newfound heightened scrutiny.

2. *Philadelphia*'s Progeny

Unfortunately, the Court failed to learn the error of its ways over the ensuing fourteen years and thus blindly followed the same ill-fated path in its next three movement of waste cases. The Court's cursory analysis in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*[320] led to two mistakes. First, conceding that the SWMA provision was discriminatory in effect because subdivisions of the state could prohibit all out-of-state waste,[321] the Court failed to apply the correct standard for discriminatory measures. It cited the *Dean Milk* test but applied some version of the *Philadelphia* test.[322]

Under the *Dean Milk* test, the Court would have examined evidence of the legitimacy of the interest, the necessity of the means employed, and the availability and adequacy of less discriminatory alternatives. Considering Michigan's legitimate goals of reducing waste generation, ensuring safe, efficient disposal, and preventing unneeded movement of a dangerous item, disposal close to source and protection from frustration of that plan were the necessary means of achieving those goals. If counties had to send their waste elsewhere because foreign waste filled their landfills, counties would not be taking responsibility for their waste generation and waste traffic would be

320. 504 U.S. 353 (1992).

321. *But see id.* at 358 (noting that district court and court of appeals upheld measure as evenhanded and not clearly excessive); *id.* at 370 (Rehnquist, C.J., dissenting) ("[T]his facially neutral restriction (i.e., it applies equally to both interstate and intrastate waste) . . . is [not] the stuff of which economic protectionism is made."); Evergreen Waste Sys., Inc. v. Metropolitan Serv. Dist., 820 F.2d 1482, 1485 (9th Cir. 1987) (upholding a local restriction on out-of-locale waste under the *Pike* test); Shaun Anderson, Comment, Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources: *Solid Waste Management and the Dormant Commerce Clause*, 28 New Eng. L. Rev. 745, 773 (1994) (asserting that the Supreme Court should have found the Michigan measure evenhanded and applied the *Pike* test).

322. *Fort Gratiot*, 504 U.S. at 359, 366-67.

needlessly risking health and safety along the road. Meanwhile, those who sent their waste into the county would be shirking responsibility for their waste and causing the needless hazards of waste transportation. Consumption would continue at its regular pace because trash could simply be sent away. By preventing these waste management problems, Michigan's scheme effectively protected the environment in the least restrictive manner available and would thus pass the *Dean Milk* test.

The Court not only failed to apply the *Dean Milk* analysis, it also failed to properly apply the analysis it chose to implement. "A state statute that clearly discriminates against interstate commerce is . . . unconstitutional 'unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.'"[323] Michigan was not attempting to protect its citizens from out-of-state competition. It was pursuing a laudable goal unrelated to economic protectionism in the only way adequate to reduce consumption and effectively manage waste. In reality, the measure most disadvantaged the Michigan citizens who had to take responsibility and pay more for safe disposal. Michigan citizens could no longer send their waste to cheap-land states with cheap disposal practices. This local disadvantage provides a sufficient check against unduly burdensome regulations.[324] Even if the above standard were only meant to rephrase the *Philadelphia* analysis, the Court again failed to recognize that (1) out-of-state waste is more harmful because it either forces the exportation of in-state waste or accumulates in addition to in-state waste; and (2) the nature of waste requires that it be disposed of as close to its source as possible. If the Court had recognized these truths, it could have either analyzed the measure under *Dean Milk* because of the valid differentiation between in-state and out-of-state waste or upheld the measure under *Philadelphia*'s quarantine analysis. Instead,

> [t]he Court . . . penalize[d] the State of Michigan for what to all appearances are its good-faith efforts, in turn encouraging each State to ignore the waste problem in the hope that another will pick up the slack. The Court's approach fails to recognize that the latter option is one that is quite real and quite attractive for many states — and becomes even more so when the intermediate option of solving its own problems, but only its own problems, is eliminated.[325]

The Court made the same mistakes in *Chemical Waste Management, Inc. v. Hunt*[326] as it did in *Fort Gratiot*. First, the Court should have applied the *Dean Milk* rule to find that the legitimate state concerns

323. *Id.* at 359 (quoting New Energy Co. v. Limbach, 486 U.S. 269, 274 (1988)).

324. *Id.* at 370 (Rehnquist, C.J., dissenting) (contending that the Michigan statute "rais[ed] prices for all the State's consumers, and work[ed] to the substantial disadvantage of other segments of the State's population").

325. *Id.* at 373 (Rehnquist, C.J., dissenting).

326. 504 U.S. 334 (1992).

voiced by Alabama could not be adequately served by any less discriminatory means. Alabama could have prohibited imports of hazardous waste altogether, but instead it gave out-of-state generators the option of paying for disposing of their waste somewhere other than near home. Alabama's extra fee for disposal of out-of-state waste sought to discourage the incredibly high flow of hazardous waste into Alabama and force generators to pay for the management of their waste and the environmental degradation their waste caused.[327] Both of these legitimate goals could be adequately served only by an additional fee or an even more discriminatory measure.

In any event, the Court did not apply the *Dean Milk* analysis. Given the purpose of the statute and the means chosen to protect the environment, however, the Court should have recognized that Alabama's regulating the flow of waste could be constitutional even under *Philadelphia*. First, Alabama differentiated between in-state and out-of-state waste not only based on the harms of excess accumulation but also based on payment for its disposal.[328] Alabama citizens (including businesses) paid for disposal through tax revenue used to monitor disposal practices, through loss of clean environment, and through an increase in health and safety risks; meanwhile, noncitizens dumped their waste without feeling any of these repercussions.[329] Additionally, Alabama's stated purpose included the factors the *Philadephia* Court had delineated as forming the basis for its quarantine analysis. Alabama sought to reduce the dangerous movement of hazardous waste and encourage disposal close to its source.[330] The Court should therefore have upheld the Alabama measure.

In *Oregon Waste Systems, Inc. v. Department of Environmental Quality*,[331] the Court repeated its improper analysis regarding discriminatory fees and created an additional problem. Not only did the Court again blindly follow the outcome of *Philadelphia* without questioning its faulty reasoning or suitably analyzing the nature of waste and waste disposal, but the Court also failed to clearly enunciate the standard it was applying. It merged the *Dean Milk* "no adequate alternatives" rule with the per se rule[332] but made no attempt to analyze the legitimacy of Oregon's comprehensive waste management and

327. *Id.*, 504 U.S. at 343.

328. *Id.* (citing Alabama's purpose of providing for "compensatory revenue for the costs and burdens that out-of-state waste generators impose by dumping their hazardous waste in Alabama" (quoting Hunt v. Chemical Waste Management, Inc., 584 So. 2d 1367, 1389 (Ala. 1991))).

329. *See id.* at 350-52 (Rehnquist, C.J., dissenting).

330. *Id.* (citing Alabama's purposes of protecting "the health and safety of citizens of Alabama from toxic substances" and reducing "the overall flow of wastes traveling on the state's highways, which flow creates a great risk to the health and safety of the state's citizens" (quoting *Hunt v. Chemical Waste*, 584 So. 2d at 1389)).

331. 114 S. Ct. 1345 (1994).

332. *See id.* at 1351.

compensatory scheme.[333] Once more the Court applied the wrong test and misapplied the test it selected. Instead of protecting other states from Oregon's economic protectionism,

> the Court's analysis turn[ed] the Commerce Clause on its head. Oregon's neighbors will operate under a competitive advantage against their Oregon counterparts as they can now produce solid waste with reckless abandon and avoid paying concomitant state taxes to develop new landfills and clean up retired landfill sites.[334]

C & A Carbone, Inc. v. Town of Clarkstown,[335] on the other hand, did not follow exactly the same pattern as the other three *Philadelphia* progeny. Most notably, the majority applied the *Dean Milk* test to the Clarkstown ordinance.[336] The majority's mistake, however, was finding discriminatory effect in Clarkstown's evenhanded measure. The ordinance treated in-state and out-of-state waste producers exactly the same and fulfilled a contract with one person, who may or may not have come from Clarkstown, for waste separation.[337] Even assuming, however, that the measure discriminated in practical effect, the majority still should have pointed to evidence tending to show that other means of ensuring safe waste disposal were both available and adequate rather than relying on judicial knowledge. The Court applied the *Dean Milk* analysis in such a cursory manner that it never actually analyzed the evidence of alternative means.

Justice O'Connor, in contrast, seems to have properly applied the *Pike* test to the Clarkstown ordinance. The narrow purpose of the ordinance was to finance the transfer station and its effect was to squelch competition in its local processing market. The town failed to prove that the local benefits from that financing scheme outweighed the burdens on interstate commerce.[338] The ordinance, in addition, did not require that waste be disposed in Clarkstown, only sorted in Clarkstown. Had the town forced haulers to send their waste to one disposal facility as a means of preventing unnecessary movement of waste and taking responsibility for their own waste disposal, then the local benefits would have outweighed the burden on interstate commerce.

The Supreme Court has haphazardly waded through its waste cases without clearly defining a standard[339] and without carefully examining the nature of waste, the essentials of waste management, or the reali-

333. *See supra* notes 248-53 and accompanying text.
334. *Oregon Waste*, 114 S. Ct. at 1357 (Rehnquist, C.J., dissenting).
335. 114 S. Ct. 1677 (1994).
336. *See supra* notes 259-63 and accompanying text.
337. *See Carbone*, 114 S. Ct. at 1687-89 (O'Connor, J., concurring).
338. *Id.* at 1689-91.
339. "[U]ncertainty in application has been attributable in no small part to the lack of any clear theoretical underpinning for judicial 'enforcement' of the Commerce Clause." Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 260 (1987) (Scalia, J., concurring in part and dissenting in part).

ties of the disposal crisis. The Court "has failed to generate the kind of consistent, principled decisionmaking that is essential to the orderly development of constitutional law."[340] The Court has no clear method for determining what is and what is not discriminatory.[341] Moreover when the Court finds a measure discriminatory on its face or in practical effect, it has no clear standard under which to analyze the measure. In the context of the movement of wastes, the Court has applied the *Philadelphia* per se invalidity rule,[342] a hybrid of that rule and the *Dean Milk* "no adequate alternatives" rule,[343] and the *Dean Milk* rule incorrectly defined as the per se invalidity rule.[344]

The *Dean Milk* test best advances the goals of the dormant Commerce Clause and the Court should thus utilize it when faced with discriminatory state measures.[345] When the Court uses this test, it should demand to hear evidence on the adequacy of all alternatives and should defer to state legislatures if the data is inconclusive. State legislatures make policy decisions regarding the means necessary to protect human health and the environment and the Supreme Court overrides these decisions without any information as to what schemes would or would not effectively reduce waste production or manage waste. The Court should not be replacing legislative findings and policy decisions with its own. The Court should also recognize that the highest level of environmental protection can only be achieved by reducing consumption, taking responsibility for one's own waste generation, and decreasing the amount of waste in transit. These goals in turn require that states manage their own waste and only their own waste.

The Supreme Court will not soon overturn its recent precedents on the free movement of waste and may use the *Philadelphia* analysis again. In that case, the Court should analyze more carefully the nature of waste. If the Court appreciated the noxious nature of waste and the resultant need for comprehensive waste management plans, it

340. Earl M. Maltz, *How Much Regulation Is Too Much - An Examination of Commerce Clause Jurisprudence*, 50 Geo. Wash. L. Rev. 47, 89 (1981).

341. Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986) ("[T]here is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause and the category subject to the *Pike v. Bruce Church* balancing approach.").

342. City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); *see also* Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 504 U.S. 353, 359 (1992) (stating that "*Philadelphia v. New Jersey* provides the framework for our analysis of this case").

343. *See* Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 114 S. Ct. 1345, 1350 (1994); Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334, 344-46 (1992).

344. *See* C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677, 1683 (1994).

345. *See supra* part IV.A.1 (arguing that the *Dean Milk* analysis is far more appropriate than the *Philadelphia* analysis).

could uphold measures that restrict the free flow of waste even under *Philadelphia*.[346]

The European Court of Justice has followed the route suggested by this Note and accordingly has upheld a complete ban on out-of-region waste. This part continues by analyzing the regulations imposed in United States waste disposal cases in light of the Court of Justice's jurisprudence.

B. *The Movement of Waste Enlightened by the Court of Justice*

The European Court of Justice has examined the conflict between the free movement of goods and environmental protection in the form of efficient and safe waste management in *Walloon Waste*.[347] *Walloon Waste* reveals the Court of Justice's understanding of the unique characteristics of waste as a product and of the need to employ the proximity and self-sufficiency principles to achieve a high level of environmental protection. Applying the Court of Justice's understanding and reasoning to the measures reviewed in the United States movement of waste cases would thus produce very different outcomes in four of those cases.

1. *City of Philadephia v. New Jersey*

New Jersey's complete ban of out-of-state waste came in response to dwindling landfill capacity. In order to plan for the disposal of its own waste and minimize residents' and the environment's exposure to solid waste, New Jersey passed the Waste Control Act. This act prohibited the incineration or landfill in New Jersey facilities of waste generated or collected outside the state.[348] New Jersey's plight and response almost exactly coincide with Wallonia's.[349] If the statute were analyzed with the Court of Justice's insight, it would be upheld under either the *Dean Milk* or *Philadelphia* test.

The New Jersey statute was facially discriminatory and therefore should have been scrutinized under the *Dean Milk* test which parallels the Court of Justice's proportionality test. The first question then becomes whether New Jersey's local interest in protecting its environment and the health and safety of its citizens was both legitimate and the true interest. Environmental protection was a legitimate local interest and New Jersey was clearly attempting to protect the environment not, implement a "disguised restriction on trade."[350] The legislature based its findings as to the shrinking landfill space and the

346. *See supra* part IV.B (applying the Court of Justice's reasoning to *Philadelphia* and its progeny under both the *Dean Milk* and *Philadelphia* tests).

347. Case C-2/90, 1992 E.C.R. I-4431, [1993] 1 C.M.L.R. 365 (1992).

348. Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth., 348 A.2d 505, 508 (N.J. 1975).

349. *See supra* part III.C.

350. *See* EC Treaty art. 36.

threat to the quality of New Jersey's environment caused by out-of-state waste on data collected over five years.[351]

The second question is whether adequate nondiscriminatory alternatives to the complete ban of out-of-state waste existed. According to the Court of Justice, the accumulation of out-of-state waste, especially in a state with overburdened landfills, creates a serious danger to health and environment that justifies a serious restriction on the free movement of goods. Considering particularly that the Community and the world consider point source management and self-sufficiency to be the best means of reducing waste generation and efficiently managing waste, a measure that implements these principles would be upheld as necessary to the protection of the environment.[352] Applying the Court of Justice's reasoning to the New Jersey statute, which implemented those principles, would accordingly result in the statute's being upheld under a *Dean Milk* analysis.

If the statute were analyzed under *Philadelphia*, the first inquiry would be whether out-of-state waste could be distinguished from in-state waste. The Court of Justice recognizes that waste's cumulative effect makes out-of-state waste more dangerous and harmful than in-state waste.[353] Having distinguished in-state and out-of-state waste, the Supreme Court's analysis would then require an examination of the existence of adequate alternatives as in *Maine v. Taylor*.[354] As noted in the preceding paragraph, the statute would survive the *Dean Milk* "no adequate alternatives" test. A separate exception to *Philadelphia*'s per se invalidity rule arises if waste can be characterized as an item that by its movement creates danger and by its nature should be disposed of at its source.[355] The Court of Justice clearly characterized waste in this way when it adopted the proximity principle which embodies the conclusions that waste should be moved as little as possible and should be safely disposed of as close to its source as possible.[356] The Court of Justice's approach would therefore save New Jersey's statute under either the *Dean Milk* or the *Philadelphia* test.

2. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*

Michigan enacted a comprehensive waste management plan that required local regions to manage their own waste over twenty years. Its purpose was to use point source management as a means of reducing waste generation and safely disposing of waste. Part of the plan included banning out-of-region waste if the receiving county could not

351. *Hackensack*, 348 A.2d at 507, 509-10.
352. *See supra* part III.C.
353. *See id.*
354. *See supra* text accompanying notes 111-19.
355. *See supra* note 221 and accompanying text.
356. *See supra* part III.C.

handle the influx.[357] This provision has the same purpose and effect on commerce as the Wallonian provision. Although the Michigan and Wallonian measures could be considered evenhanded because each equally prohibits intrastate and interstate waste from being disposed of in the region, neither the Supreme Court nor the Court of Justice found them evenhanded for that reason. The Supreme Court found the Michigan measure discriminatory whereas the Court of Justice found the Wallonian measure nondiscriminatory by differentiating in-state from out-of-state waste.[358] Under Supreme Court doctrine, differentiating in-state and out-of-state goods would justify not the *Pike* test for evenhanded measures, but rather a reprieve from the per se invalidity test and an application of the *Dean Milk* test.[359]

Assuming then that the *Dean Milk* rule applies, the Court of Justice would consider Michigan's regional ban necessary to attain the goal of environmental protection just as it considered Wallonia's regional ban necessary. The Michigan measure particularly implements the proximity and self-sufficiency goals that the Court of Justice has deemed necessary components in an efficient waste management scheme. The Michigan provision would therefore be upheld under the Court of Justice's rationale. If the *Philadelphia* analysis enlightened by the Court of Justice's insight applies, the Michigan provision would receive an analysis identical to that of the New Jersey statute[360] and would thus also be upheld under *Philadelphia.*

3. *Chemical Waste Management, Inc. v. Hunt* and *Oregon Waste Systems, Inc. v. Department of Environmental Quality*

As part of comprehensive waste management plans, both Alabama and Oregon imposed discriminatory fees on disposal within their borders of waste generated outside their borders. Alabama insisted that the additional fee for out-of-state waste served the purposes of protecting human health and safety from excess waste, conserving the environment, providing compensatory revenue for dumping in Alabama, and reducing the risk created by waste traveling on the state's highways.[361] Oregon's purpose was also to recoup revenue for disposing of waste generated by those who did not pay taxes in Oregon and to reduce the flow of waste into Oregon generally.[362] At least some of

357. Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 504 U.S. 353, 355-57 (1992).

358. *See supra* part III.C.

359. *See* Maine v. Taylor, 477 U.S. 131, 151-52 (1986) (distinguishing *Philadelphia* by distinguishing in-state from out-of-state crayfish and then applying the *Dean Milk* "no adequate alternatives" test to the discriminatory statute in question).

360. *See supra* part IV.B.1.

361. Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334, 343 (1992).

362. *See* Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 114 S. Ct. 1345, 1351, 1354 (1994).

these purposes comport with the proximity and self-sufficiency principles.

Both the Alabama and Oregon measures are facially discriminatory under Supreme Court doctrine. Applying the *Dean Milk* test and the Court of Justice's rationale, the measures would be upheld as necessary to environmental protection because they reduce the movement of waste and force generators to take responsibility for their own waste, thereby preventing the dangers of movement and reducing consumption. The only alternative that would effectively reduce the flow of waste generally and protect the states' citizens from the accumulation of waste would be banning out-of-state waste completely, which is more discriminatory than an additional fee. Alabama's and Oregon's waste management schemes would thus be upheld under *Dean Milk*. The *Philadelphia* analysis, coupled with the Court of Justice's views on the differences between in-state and out-of-state waste and the necessity of disposing of waste as close to its source as possible, mimics the analysis of the New Jersey, Michigan, and Wallonian measures. Because Alabama and Oregon implemented the proximity and self-sufficiency principles in their waste management schemes, those schemes would also be upheld under a Court of Justice-enlightened *Philadelphia* test.

4. *C & A Carbone, Inc. v. Town of Clarkstown*

The Clarkstown flow control ordinance required all solid waste in the town to be sorted at the designated transfer station before leaving the municipality.[363] The narrow purpose of the ordinance was to finance the transfer station by guaranteeing a minimum waste flow and allowing the contractor to charge a per ton tipping fee. The broader purpose was to efficiently manage waste by building and maintaining a state-of-the-art waste transfer facility.[364] Because the ordinance did nothing to ensure that disposal would occur as close to the source of the waste as possible, it did not fulfill the proximity or self-sufficiency principles.

The discrimination found in this ordinance was against out-of-state waste processors. Under the *Dean Milk* test or the Court of Justice's proportionality test, this ordinance might fail simply because financing a local business is generally not a legitimate state purpose. Even if the court accepted the environmental goal, however, it probably would not consider forcing all waste to be separated at one facility necessary to protect the environment. The ordinance does not prevent the accumulation of waste, reduce movement of waste, nor take ultimate responsibility for disposing of the waste. Evidence would most likely show that less restrictive alternatives for separating recyclable from

363. C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677, 1680 (1994).
364. *Id.* at 1690 (O'Connor, J., concurring).

nonrecyclable items would be adequate to achieve efficient waste management. Under the *Philadelphia* analysis, the ordinance would fail because even the Court of Justice most likely would not find a reason to distinguish between in-state and out-of-state processors. Furthermore, the nature of waste is not at issue in this case.

Had the ordinance prohibited exports of waste for disposal and sent all waste to one landfill in an effort to efficiently handle waste disposal, it would have implemented the proximity and self-sufficiency principles necessary for protection of the environment. In that case, the Court of Justice's analysis would have led it to be upheld.

CONCLUSION

Before we know it, the United States will be buried in garbage. With each movement of waste case it reviews, "[t]he Court . . . further limits the dwindling options available to States as they contend with the environmental, health, safety, and political challenges posed by the problem of solid waste disposal in modern society."[365] The nature of waste, the need for comprehensive waste management plans for the future, and the crisis situation facing the nation, all counsel a new approach to the flow of waste across the country. The Supreme Court need only look across the Atlantic to the European Court of Justice for a lesson in how to balance free trade and the environment. As the New Transatlantic Agenda states:

> We, the United States of America and the European Union, affirm our conviction that the ties which bind our people are as strong today as they have been for the past half century. For over fifty years, the transatlantic partnership has been the leading force for peace and prosperity for ourselves and for the world. . . . Today we face new challenges at home and abroad. . . . [W]e can learn from each other's experiences and build new transatlantic bridges.[366]

Hopefully the Supreme Court will build a transatlantic bridge to the European Court of Justice and adopt its approach to saving the world from the free flow of waste.

365. *Oregon Waste*, 114 S. Ct. at 1359 (Rehnquist, C.J., dissenting).

366. *Joint European Union-U.S. "New Trans-Atlantic Agenda" and Action Plan Signed by President Clinton and EU Officials at Madrid Summit Dec. 3, 1995*, 1995 Daily Rep. for Executives (BNA) No. 234, doc. 88 (Dec. 6, 1995), *available in* Westlaw, BNA-DER database.